

FILED  
DISTRICT COURT OF GUAM



UNITED STATES DISTRICT COURT  
CENTRAL DISTRICT OF CALIFORNIA  
WESTERN DIVISION  
312 North Spring Street, Room G-8  
Los Angeles, CA 90012  
Tel: (213) 894-3535

APR 18 2008  
SOUTHERN DIVISION  
3470 Twelfth Street, Suite 1053  
San Diego, CA 92101-4510  
Clerk of Court

SHERRI R. CARTER  
District Court Executive and  
Clerk of Court

EASTERN DIVISION  
3470 Twelfth Street, Room 134  
Riverside, CA 92501  
(951) 328-4450

April 4, 2008

Clerk, United District Court  
District of Guam  
520 West Soledad Avenue, 4th Floor  
Hagatna, GU 96910-4950

Re: Transfer of our Civil Case No. CV 07-7150-R (AGR)  
Case Title: ISAGANI DE LA PENA v. S.A. HOLENCIK

Dear Sir/Madam:

An order having been made transferring the above-numbered case to your district, we are transmitting herewith our entire original file in the action, together with certified copies of the order and the docket. Please acknowledge receipt of same and indicate below the case number you have assigned to this matter on the enclosed copy of this letter and return it to our office. Thank you for your cooperation.

Very truly yours,

Clerk, U.S. District Court

By Maxine B. [Signature]  
Deputy Clerk

cc: All counsel of record

=====

**TO BE COMPLETED BY RECEIVING DISTRICT**

Receipt is acknowledged of the documents described herein and we have assigned this matter case number CV: \_\_\_\_\_.

Clerk, U.S. District Court

By \_\_\_\_\_  
Deputy Clerk

(AGRx), 194, CLOSED

**UNITED STATES DISTRICT COURT, CENTRAL DISTRICT OF  
CALIFORNIA (Western Division - Los Angeles)  
CIVIL DOCKET FOR CASE #: 2:07-cv-07150-R-AGR  
Internal Use Only**

Isagani De La Pena v. S.A. Holencik  
Assigned to: Judge Manuel L. Real  
Referred to: Magistrate Judge Alicia G. Rosenberg  
Cause: 28:2241 Petition for Writ of Habeas Corpus  
(federal)

Date Filed: 10/31/2007  
Date Terminated: 04/01/2008  
Jury Demand: None  
Nature of Suit: 530 Habeas  
Corpus (General)  
Jurisdiction: Federal Question

**Petitioner**

**Isagani De La Pena**

I hereby attest and certify on 4/4/2008  
that the foregoing document is a full, true  
and correct copy of the original on file in  
my office, and in my legal custody.  
CLERK U.S. DISTRICT COURT  
CENTRAL DISTRICT OF CALIFORNIA  
*Manuel L. Real*  
DEPUTY CLERK



represented by **Isagani De La Pena**

REG 00944-093  
Federal Correctional Institution  
Victorville  
P O Box 5300  
Adelanto, CA 92301  
PRO SE

V.

**Respondent**

**S. A. Holencik**

represented by **Assistant US Attorney LA-CV**  
AUSA - Office of US Attorney  
Civil Division  
300 N Los Angeles St, Ste 7516  
Los Angeles, CA 90012  
213-894-2434  
Email:  
USACAC.Civil@usdoj.gov  
**LEAD ATTORNEY**  
**ATTORNEY TO BE NOTICED**

**Eric David Vandavelde**

AUSA - Office of US Attorney

312 North Spring Street

Los Angeles, CA 90012

213-894-2576

Email:

usacac.criminal@usdoj.gov

**LEAD ATTORNEY****ATTORNEY TO BE NOTICED**

<b>Date Filed</b>	<b>#</b>	<b>Docket Text</b>
04/04/2008	<a href="#"><b>11</b></a>	TRANSMITTAL of documents: original file, certified copy of order and docket sheet to District of Guam. (mp) (Entered: 04/04/2008)
04/01/2008	<a href="#"><b>10</b></a>	ORDER by Judge Manuel L. Real transferring case to District of Guam. Original file, certified copy of the transfer order and docket sheet sent. (MD JS-6. Case Terminated.). It is therefore ORDERED that this action be transferred to the United States District Court for the District of Guam, and that the Clerk of this Court effect such transfer. It is further ORDERED that the Clerk serve copies of this Order on the parties. (mp) (Entered: 04/04/2008)
03/07/2008	<a href="#"><b>9</b></a>	Traverse Motion in Response to Government's Motion to Dismiss Petition filed by Petitioner Isagani De La Pena. (mp) (Entered: 03/14/2008)
03/06/2008	<a href="#"><b>8</b></a>	ORDER RE: FILING OF OPPOSITION TO MOTION TO DISMISS by Judge Alicia G. Rosenberg. The Court believes that an Opposition may be of assistance in determining this matter. Therefore, it is ordered that petitioner file an Opposition no later than April 7, 2008. Unless the Court orders otherwise, the matter will be deemed submitted on the day following the day petitioner's Opposition is due. (mp) (Entered: 03/06/2008)
01/16/2008	<a href="#"><b>7</b></a>	NOTICE OF MOTION AND MOTION to Dismiss for Lack of Jurisdiction <i>Petition for Habeas Corpus</i> filed by Respondent S. A. Holencik. (Vandavelde, Eric) (Entered: 01/16/2008)

12/24/2007	●6	MEMORANDUM in Support of 28 U.S.C. 2241 Petition [1], filed by Petitioner Isagani De La Pena. (yca) (Entered: 01/16/2008)
12/05/2007	●5	MINUTES OF IN CHAMBERS ORDER by Judge Alicia G. Rosenberg re: Petition for Writ of Habeas Corpus (2241)[1]. IT IS HEREBY ORDERED that Petitioner may file the "accompanying memorandum" referenced on Page 3 of his Petition on or before January 7, 2008. The time for Respondent to file a motion to dismiss or answer pursuant to Paragraphs 3 and 6 of the Order filed November 13, 2007, shall run from the date of service of Petitioner's accompanying memorandum unless otherwise ordred by the Court. In all respects, the provisions of the Order filed November 13, 2007, shall remain in effect. (agrcrd, ) (Entered: 12/06/2007)
11/28/2007	●4	NOTICE of Attorney Appearance for Respondent filed by attorney Eric David Vandavelde on behalf of Respondent S. A. Holencik (agrcrd, ) (Entered: 11/29/2007)
11/13/2007	●3	ORDER REQUIRING RESPONSE TO PETITION (FEDERAL CUSTODY by Judge Alicia G. Rosenberg re Petition for Writ of Habeas Corpus (2241)[1]. Petitioner has filed a Petition for Writ of Habeas Corpus pursuant to 28 U.S.C. Section 2241. In order to facilitate the just, speedy, and inexpensive determination of this action, IT IS ORDERED that within 14 days, Respondent shall serve and file a Notice of Appearance notifying the Court of the name of the attorney who will have principal charge of the case, together with the address where the attorney may be served, and attorney's telephone and fax number. If respondent contends that the Petition can be decided without the Court reaching the merits of petitioner's claims, respondent shall file a motion to dismiss no later than 30 days of the date of this Order. If respondent does not contend that the Petition can be decided without the Court reaching the merits of petitioner's claims, respondent shall file and serve an Answer to the Petition no later than 45 days of the date of this Order. Petitioner shall file his Opposition to the respondent's motion to dismiss or a Reply to the Answer to Petition within thirty (30) days of the date of service thereof. (See Order for details.) (agrcrd, ) (Entered: 11/13/2007)
10/31/2007	●2	NOTICE OF REFERENCE TO A U.S. MAGISTRATE JUDGE.

		Pursuant to the provisions of the Local Rules, the within action has been assigned to the calendar of Judge Manuel L. Real and referred to Magistrate Judge Alicia G. Rosenberg to consider preliminary matters and conduct all further matters as appropriate. The Court must be notified within 15 days of any change of address. (ghap) (Entered: 11/08/2007)
10/31/2007	●1	PETITION for Writ of Habeas Corpus by a Person In Federal Custody (28:2241) Case assigned to Judge Manuel L. Real and referred to Magistrate Judge Alicia G Rosenberg.(Filing fee \$ 5 fee due), filed by petitioner Isagani De La Pena.(ghap) (Entered: 11/08/2007)

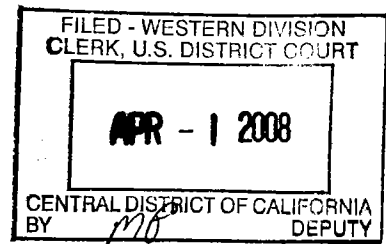
1 I hereby attest and certify on 4/1/2008  
2 that the foregoing document is a full, true  
3 and correct copy of the original on file in  
4 my office, and in my legal custody.

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CLERK U.S. DISTRICT COURT  
CENTRAL DISTRICT OF CALIFORNIA

DEPUTY CLERK



1172



UNITED STATES DISTRICT COURT  
CENTRAL DISTRICT OF CALIFORNIA

ISAGANI DE LA PENA,

Petitioner,

v.

S.A. HOLENCIK,

Respondent.

NO. CV 07-7150-R (AGR)

ORDER TRANSFERRING  
ACTION TO UNITED STATES  
DISTRICT COURT FOR THE  
DISTRICT OF GUAM

I.

**SUMMARY OF PROCEEDINGS**

Petitioner is in custody at Federal Correctional Institution - Victorville in Adelanto, California, which is in the Central District of California. In 2001, a jury convicted Petitioner in the District of Guam on drug and weapons charges. (Petition, Memo at 1-2.) Petitioner was sentenced to 365 months in prison. (Petition at 2.) On February 26, 2003, the Ninth Circuit affirmed the conviction. (Id.) On July 7, 2005, the trial court in the District of Guam denied Petitioner's motion made pursuant to 28 U.S.C. § 2255. (Id.)

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///

1 On October 31, 2007, Petitioner filed a Petition for Writ of Habeas Corpus  
2 pursuant to 28 U.S.C. § 2241 in this Court in which he raised two grounds: (1)  
3 double jeopardy and (2) ineffective assistance of counsel.

4 On January 16, 2008, Respondent filed a motion to dismiss, arguing that  
5 the petition should be dismissed for lack of jurisdiction. On March 7, 2008,  
6 Petitioner filed a reply.

7 The matter is now under submission. For the reasons described below, the  
8 action must be transferred to the District of Guam.

9 II.

10 **DISCUSSION**

11 “[T]o determine whether jurisdiction is proper, a [federal] court must first  
12 determine whether a habeas petition is filed pursuant to § 2241 or § 2255 before  
13 proceeding to any other issue.” *Hernandez v. Campbell*, 204 F.3d 861, 865 (9th  
14 Cir. 2000) (per curiam). A § 2255 motion must be filed in the sentencing court.  
15 28 U.S.C. § 2255 (a prisoner may “move the court which imposed the sentence to  
16 vacate, set aside or correct the sentence”). On the other hand, a § 2241 petition  
17 must be filed in the district in which the prisoner is in custody. *Braden v. 30th*  
18 *Judicial Circuit Court of Ky.*, 410 U.S. 484, 494-95, 93 S. Ct. 1123, 35 L. Ed. 2d  
19 443 (1973). A federal prisoner may not substitute a § 2241 petition for a § 2255  
20 motion. *Charles v. Chandler*, 180 F.3d 753, 758 (6th Cir. 1999) (“The remedy  
21 afforded under § 2241 is not an additional, alternative or supplemental remedy to  
22 that prescribed under § 2255”); see also *Porter v. Adams*, 244 F.3d 1006, 1007  
23 (9th Cir. 2001) (“Merely labeling a section 2255 motion as a section 2241 petition  
24 does not overcome the bar against successive section 2255 motions”).

25 “[M]otions to contest the legality of a sentence must be filed under § 2255 .  
26 . . . , while petitions that challenge the manner, location, or conditions of a

27 ///

28 ///



1 sentence's execution must be brought pursuant to § 2241."<sup>1</sup> *Hernandez*, 204  
2 F.3d at 864 (citations omitted).

3 Petitioner clearly challenges the legality of the sentence imposed. In Count  
4 3, Petitioner was convicted of distribution of methamphetamine within 1000 feet  
5 of a playground. In Count 2, he was convicted of distribution of  
6 methamphetamine. (Petition, Memo at 2-3.) In Ground One, Petitioner argues  
7 that Count 2 is a lesser included offense of Count 3, and that conviction on both  
8 counts violates double jeopardy. (*Id.* at 3.) In Ground Two, Petitioner argues that  
9 his trial counsel was ineffective for failing to object to the alleged violation of  
10 double jeopardy. (*Id.* at 5.)

11 Petitioner acknowledges that normally § 2255 would be the appropriate  
12 mechanism for testing the legality of his detention. (*Id.* at 3.) However, he said  
13 he couldn't properly raise the double jeopardy ground at the time of the filing of  
14 his § 2255 motion on January 23, 2004, because the case he relies on, *United*  
15 *States v. Perry*, 389 F. Supp. 2d 278, 285 (D.R.I. 2005), had not yet been  
16 decided. (*Id.* at 4.) Consequently, Petitioner argues that he did not have an  
17 "unobstructed procedural shot" in his original § 2255 motion and that he is "legally  
18 innocent" of the lesser included offense. (*Id.*)

19 Petitioner's claim that his petition comes under § 2255's savings clause is  
20 meritless. Section 2255 provides:

21 An application for a writ of habeas corpus in behalf of a prisoner who  
22 is authorized to apply for relief by motion pursuant to this section,  
23 shall not be entertained if it appears that the applicant has failed to  
24 apply for relief, by motion, to the court which sentenced him, or that  
25 such court has denied him relief, unless it also appears that the

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26  
27 <sup>1</sup> For example, a challenge to the Parole Commission's "decision in setting  
28 [the] term of parole" would be brought by petition under § 2241. See *Doganieri*  
*v. United States*, 914 F.2d 165, 169-70 (9th Cir. 1990), *cert. denied*, 499 U.S. 940  
(1991).



1 remedy by motion is inadequate or ineffective to test the legality of  
2 his detention.

3 Because Petitioner has already made a § 2255 motion that was denied,  
4 this Court has jurisdiction only if Petitioner's "remedy by motion is inadequate or  
5 ineffective to test the legality of his detention." 28 U.S.C. § 2255; see *Moore v.*  
6 *Reno*, 185 F.3d 1054, 1055 (9th Cir. 1999), *cert. denied*, 528 U.S. 1178 (2000).  
7 This language in § 2255 has been labeled the "savings clause" (*Hernandez*, 204  
8 F.3d at 864-65) or the "escape hatch" (*Stephens v. Herrera*, 464 F.3d 895, 898  
9 (9th Cir. 2006), *cert. denied*, 127 S. Ct. 1896 (2007)).

10 In 1997, the Ninth Circuit had not "fully explained" when the "savings  
11 clause" applied but had "recognized that it is a narrow exception." *United States*  
12 *v. Pirro*, 104 F.3d 297, 299 (9th Cir. 1997). By 2000, the Ninth Circuit  
13 acknowledged that other circuits had held that the savings clause was available  
14 to a prisoner "who is 'actually innocent' of the crime of conviction, but who never  
15 has had 'an unobstructed procedural shot' at presenting a claim of innocence."  
16 *Lorentsen v. Hood*, 223 F.3d 950, 953-54 (9th Cir. 2000). Although *Lorentsen*  
17 declined to formally adopt this formulation, it nonetheless found that its petitioner  
18 would not be entitled to relief because he was not "actually innocent." *Id.* at 954.

19 "To establish actual innocence, petitioner must demonstrate that, in light of  
20 all the evidence, it is more likely than not that no reasonable juror would have  
21 convicted him." *Bousley v. United States*, 523 U.S. 614, 623, 118 S. Ct. 1604,  
22 140 L. Ed. 2d 828 (1998) (citation and internal quotation marks omitted).

23 "Petitioner bears the burden of proof on this issue by a preponderance of the  
24 evidence, and he must show not just that the evidence against him was weak, but  
25 that it was so weak that 'no reasonable juror' would have convicted him [citation  
26 omitted]. . . . [T]he parties are not limited to the existing trial record; the issue is  
27 'factual innocence, not mere legal insufficiency.'" *Lorentsen*, 223 F.3d at 954  
28 (quoting *Bousley*, 523 U.S. at 623).

1 In *Ivy v. Pontesso*, 328 F.3d 1057, 1059-60 (9th Cir.), *cert. denied*, 540  
2 U.S. 1051 (2003), the Ninth Circuit implicitly adopted the other circuits'  
3 formulation of the "escape hatch." See also *Stephens*, 464 F.3d at 898 ("we have  
4 held that a § 2241 petition is available under the 'escape hatch' of § 2255 when a  
5 petitioner (1) makes a claim of actual innocence, and (2) has not had an  
6 'unobstructed procedural shot' at presenting that claim").

7 Petitioner has not satisfied the requirements of the savings clause.  
8 Petitioner alleges he did not have an "unobstructed procedural shot" at presenting  
9 his constitutional claims in his § 2255 motion because the law was not decided at  
10 the time of his § 2255 motion in 2004. (Petition, Memo at 4.) However, as  
11 Petitioner himself acknowledges later in his petition, this is false. (*Id.* at 5 (citing  
12 to *United States v. Kakatin*, 214 F. 3d 1049, 1051 (9th Cir.) ("We agree with  
13 Defendant, as does the government, that § 841(a) is a lesser-included offense of  
14 the crime described in § 860.") (citation omitted)), *cert. denied*, 531 U.S. 911  
15 (2000).) The law on this issue was well-settled before Petitioner's § 2255 motion  
16 filed on January 23, 2004. (Exh. A to Vandeveld Declaration.)

17 Petitioner also argues he is "legally innocent" of the lesser included  
18 offense. (Petition, Memo at 4.) However, the savings clause requires he be  
19 "actually innocent." *Loretsen*, 223 F.3d at 954. As *Bousley v. United States*,  
20 523 U.S. 614, 118 S. Ct. 1604, 140 L. Ed. 2d 828 (1998) explains in the context  
21 of a procedural default,<sup>2</sup> "actual innocence means factual innocence, not mere  
22 legal insufficiency."<sup>3</sup> *Id.* at 623 (citation and internal quotation marks omitted).

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23  
24 <sup>2</sup> *Loretsen* cited to *Bousley* for the definition of "actual innocence."  
25 *Loretsen*, 223 F.3d at 954.

26 <sup>3</sup> Petitioner's citation to *In re Smith*, 285 F.3d 6 (D.C. Cir. 2002) is  
27 unavailing. First, the court found that Smith had not made a prima facie showing  
28 under § 2255 to obtain authorization to file a successive § 2255 motion. *Id.* at 7-  
8. Thus, the court's statement that Smith could file a § 2241 petition in a district  
in the Seventh Circuit was dicta and was based on the Seventh Circuit's  
interpretation of the § 2255 savings clause. *Id.* at 8. Second, unlike Petitioner,

1 Petitioner's claim is not that he was actually innocent of either charge, just that he  
2 should not have been punished for both.

3 Accordingly, pursuant to 28 U.S.C. § 1631, this action should be  
4 transferred to the sentencing court, the United States District Court for the District  
5 of Guam, which has jurisdiction over Petitioner's claim. *See Hernandez*, 204 F.3d  
6 at 866.

7 **III.**

8 **CONCLUSION**

9 It is therefore ORDERED that this action be transferred to the United  
10 States District Court for the District of Guam, and that the Clerk of this Court  
11 effect such transfer.

12 It is further ORDERED that the Clerk serve copies of this Order on the  
13 parties.

14  
15 Dated: March 31, 2008

16   
17 \_\_\_\_\_  
18 MANUEL L. REAL  
19 United States District Judge

20 Presented by:

21   
22 \_\_\_\_\_  
23 ALICIA G. ROSENBERG  
24 United States Magistrate Judge

25  
26  
27 \_\_\_\_\_  
28 Smith was "actually innocent" of the charged crime because of a subsequent  
interpretation of the charging statute by the United States Supreme Court. *Id.* at  
7, 8.

FILED

*filed*

2007 OCT 31 PM 5:03

CLERK OF DISTRICT COURT  
CENTRAL DISTRICT OF CALIF.  
LOS ANGELES

BY

ISAGANI DE LA PENA  
Name

00944-093  
Prison Number

FEDERAL CORRECTIONAL INSTITUTION  
PO Box 5300

ANELANTO, CA 92301  
Address or Place of Confinement

Note: If represented by an attorney, write attorney's name, address & telephone number

# United States District Court

CENTRAL DISTRICT OF CALIFORNIA

ISAGANI DE LA PENA  
Full Name (First, Middle, Last)

530

CASE NO. 07-7150-K (AGR)  
(to be supplied by the Clerk of the  
United States District Court)

Petitioner,

vs.

S.A. HOLENCIK,

Name of Warden  
(or other authorized person having custody of petitioner)

Respondent.

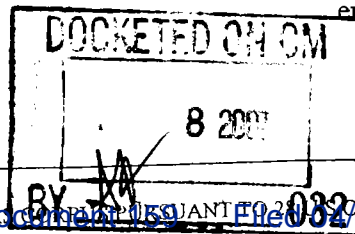
**PETITION FOR  
WRIT OF HABEAS CORPUS  
PURSUANT TO 28 U.S.C. § 2241  
BY A PERSON IN FEDERAL CUSTODY**

PLEASE COMPLETE THE FOLLOWING (check the appropriate number):

This petition concerns:

1. ☒ a conviction
2. ☒ a sentence
3. \_\_\_\_\_ jail or prison conditions
4. \_\_\_\_\_ prison discipline
5. \_\_\_\_\_ a parole problem
6. \_\_\_\_\_ other

**CAUTION:** If you are attacking a federal conviction, sentence or judgment, you must first file a direct appeal or motion under 28 U.S.C. § 2255 in the federal court which entered judgment.



## PETITION

- (1) Place of detention: F.C.I. VICTORVILLE, ADELANTO, CA 92301
- (2) Name and location of court which imposed sentence: U.S. DISTRICT COURT FOR THE TERRITORY OF GUAM
- (3) Offense(s) and indictment number(s) (if known) for the sentence imposed:  
1- 21 U.S.C. § 841 (a)(1); 2- SAME; 3- 21 U.S.C. 860; 4- 18 U.S.C. 922 (g) (1); 5- SAME; DISTRICT CT- No 00-001261 (D. Guam)
- (4) The date upon which sentence was imposed and the terms of the sentence:  
OCTOBER 9, 2002 -- 365 MONTHS IMPRISONMENT
- (5) What was your plea (check one): Not guilty (☒) Guilty ( ) Nolo contendere ( )
- (6) Kind of trial (check one): Jury (☒) Judge only ( )
- (7) Did you appeal from the judgment of conviction or the imposition of sentence: Yes (☒) No ( )
- (8) If you did appeal, answer the following for *each* appeal:

### FIRST APPEAL:

Name of court: NINTH CIRCUIT COURT OF APPEALS

Grounds raised (list each):

- 1) \_\_\_\_\_
- 2) \_\_\_\_\_

Result/Date of result: AFFIRMED, FEBRUARY 26, 2003

### SECOND APPEAL: 28 U.S.C. 2255 MOTION

Name of court: ~~11TH~~ DISTRICT COURT OF GUAM

Grounds raised (list each):

- 1) VIOLATION OF RIGHT TO SPEEDY TRIAL
- 2) VIOLATION OF RIGHT AGAINST SELF-INCRIMINATION

Result/Date of result: DENIED, JULY 7, 2005

## GROUND FOR THIS 28 U.S.C. § 2241 PETITION

- (9) State *CONCISELY* every ground on which you claim that your sentence is being executed in an illegal manner. Summarize *briefly* the *facts* supporting each ground. If necessary attach additional pages behind this page.

**CAUTION:** If you fail to set forth all grounds in this petition, you may be barred from presenting additional grounds at a later date.

→ GROUND ONE POST - CONVICTION INTERPRETATION OF STATUTE HAS RENDERED MR. DE LA PEÑA'S CONVICTION FOR § 860 (a) INVALID

Supporting *FACTS* for *GROUND ONE* (tell your story *BRIEFLY* without citing cases or law).

CAUTION: You must state *facts*, not *conclusions*, in support of your grounds. A rule of thumb to follow is -- who did exactly what to violate your rights at what time or place.

POST - CONVICTION INTERPRETATION OF STATUTE HAS MADE CLEAR THAT COUNT 2 -- DISTRIBUTION (21 U.S.C. § 841 (a)(1)) AND COUNT 3 DISTRIBUTION NEAR A PLAYGROUND (21 U.S.C. § 860) CAN BE CHARGED AT THE SAME TIME, BUT THE COURT MAY NOT, UNDER THE DOUBLE JEOPARDY CLAUSE, ENTER THE TWO AS SEPARATE CONVICTIONS BECAUSE § 841 (a)(1) IS A LESSER OFFENSE OF § 860. SEE ACCOMPANYING MEMORANDUM

→ GROUND TWO INEFFECTIVE ASSISTANCE OF COUNSEL

Supporting *FACTS* for *GROUND TWO* (tell your story *BRIEFLY* without citing cases or law).

COMPETENT COUNSEL WOULD HAVE OBJECTED TO THE ABOVE MENTIONED COUNTS ON DOUBLE JEOPARDY GROUNDS

### ADMINISTRATIVE APPEALS

(10) Have you presented the claims raised in Question #9 of this petition to prison officials in a prison administrations appeal?

Yes ( ) No ( ) If your answer is no, explain why not: \_\_\_\_\_

If your answer is yes, answer the following for *each* administrative appeal:

#### FIRST ADMINISTRATIVE APPEAL

Level of appeal: \_\_\_\_\_

Grounds raised (list each):

1) \_\_\_\_\_

2) \_\_\_\_\_

Result/Date of result: \_\_\_\_\_

#### SECOND ADMINISTRATIVE APPEAL

Level of appeal: \_\_\_\_\_

Grounds raised (list each):

1) \_\_\_\_\_

2) \_\_\_\_\_

Result/Date of result: \_\_\_\_\_

THIRD ADMINISTRATIVE APPEAL

Level of appeal: \_\_\_\_\_

Grounds raised (list each):

1) \_\_\_\_\_

2) \_\_\_\_\_

Result/Date of result: \_\_\_\_\_

FOURTH ADMINISTRATIVE APPEAL

Level of appeal: \_\_\_\_\_

Grounds raised (list each):

1) \_\_\_\_\_

2) \_\_\_\_\_

Result/Date of result: \_\_\_\_\_

- (11) Is the grievance process completed? Yes ( ) No ( )

PREVIOUS PETITIONS

- (12) Have you filed previous petitions for habeas corpus under 28 U.S.C. § 2241 or 28 U.S.C. § 2255, or any other applications, petitions or motions with respect to the claims raised in Question #9 of this petition?

Yes (✓) No ( )

- (13) If your answer to Question #13 was yes, give the following information for *each* previous petition:

FIRST PREVIOUS PETITION

Name of court: DISTRICT COURT OF GUAM

Nature of proceeding: HABEAS # 2255

Grounds raised (list each):

1) MOTION TO VACATE

2) \_\_\_\_\_

Result/Date of result: DENIED 7-7-2005

SECOND PREVIOUS PETITION

Name of court: \_\_\_\_\_

Nature of proceeding: \_\_\_\_\_

Grounds raised (list each):

1) \_\_\_\_\_

2) \_\_\_\_\_

Result/Date of result: \_\_\_\_\_

- (14) If the claims raised in Question #9 of this petition concern your conviction or sentence, explain why you are filing your petition pursuant to § 2241 instead of § 2255.

PREVIOUSLY FILED # 2255



(15) Are you presently represented by counsel?

Yes ( )

No (✓)

If so, provide your attorney's name, address, and telephone number:

---

(16) If you are seeking leave to proceed *in forma pauperis*, have you completed the application setting forth the required information?

Yes ( )

No (✓)

Note: If your answer is no, you must send a \$5.00 filing fee to the court with your petition.

---

WHEREFORE, petitioner prays that the court grant petitioner relief to which he may be entitled in this proceeding.

I declare (or certify, verify, or state) under penalty of perjury that the foregoing is true and correct.

October 3, 2007

(Date)

Isagani De La Pena  
(Signature of Petitioner)

Isagani De La Pena/Movant  
Petitioner

Isagani De La Pena

(Signature of Attorney, if any)

Isagani De La Pena/Propria Persona

FILED  
CLERK, U.S. DISTRICT COURT

OCT 31 2007

CENTRAL DISTRICT OF CALIFORNIA  
BY

**UNITED STATES DISTRICT COURT  
CENTRAL DISTRICT OF CALIFORNIA**

**ISAGANI DE LA PENA**

PLAINTIFF(S)

V.

**S. A. HOLENCIK**

DEFENDANT(S)

CASE NUMBER

**CV07- 7150 R (AGR)**

**NOTICE OF REFERENCE TO A  
UNITED STATES MAGISTRATE JUDGE  
(Petition for Writ of Habeas Corpus)**

Pursuant to General Order 07-02, the within action has been assigned to the calendar of the Honorable Manuel Real, U.S. District Judge. Pursuant to General Order 05-07, the within action is referred to U.S. Magistrate Judge Alicia G. Rosenberg, who is authorized to consider preliminary matters and conduct all further hearings as may be appropriate or necessary. Thereafter, unless the Magistrate Judge determines that an evidentiary hearing is required, the Magistrate Judge shall prepare a report and recommendation and file it with the Clerk of the Court which may include proposed findings of fact and conclusions of law where necessary or appropriate, and may include a proposed written order or judgment, which shall be mailed to the parties for objections.

Pleadings and all other matters to be called to the Magistrate Judge's attention shall be formally submitted through the Clerk of the Court.

The Court must be notified within fifteen (15) days of any address change. If mail directed by the clerk to your address of record is returned undelivered by the Post Office, and if the Court and opposing counsel are not notified in writing within fifteen (15) days thereafter of your current address, the Court may dismiss the petition with or without prejudice for want of prosecution.

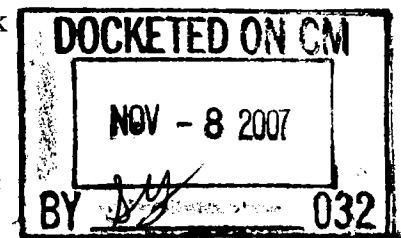
Clerk, U.S. District Court

November 1, 2007

Date

By CSAWYER

Deputy Clerk





SHERRI R. CARTER

District Court Executive  
and Clerk of Court

UNITED STATES DISTRICT COURT  
CENTRAL DISTRICT OF CALIFORNIA  
WESTERN DIVISION  
312 North Spring Street, Room G-8 Los  
Angeles, CA 90012  
Tel: (213) 894-3535

SOUTHERN DIVISION  
411 West Fourth Street, Suite 1053  
Santa Ana, CA 92701-4516  
(714) 338-4570

EASTERN DIVISION  
3470 Twelfth Street, Room 134  
Riverside, CA 92501  
(951) 328-4450

Thursday, November 01, 2007

ISAGANI DE LA PENA  
#00944-093  
P. O. BOX 5300  
ADELANTO, CA 92301

Dear Sir/Madam:

Your petition has been filed and assigned civil case number CV07- 7150 R (AGR)

Upon the submission of your petition, it was noted that the following discrepancies exist:

- ☒ 1. You did not pay the appropriate filing fee of \$5.00. Submit a cashier's check, certified bank check, business or corporate check, government issued check, or money order drawn on a major American bank or the United States Postal Service payable to 'Clerk U.S. District Court'. If you are unable to pay the entire filing fee at this time, you must sign and complete this court's Prisoner's Declaration In Support of Request to Proceed In Forma Pauperis in its entirety. The Clerk's Office will also accept credit cards (Mastercard, Visa, Discover, American Express) for filing fees and miscellaneous fees. Credit card payments may be made at all payment windows where receipts are issued.
- ☒ 2. The Declaration in Support of Request to Proceed in Forma Pauperis is insufficient because:
- ☐ (a) You did not sign your Declaration in Support of Request to Proceed in Forma Pauperis.
- ☒ (b) Your Declaration in Support of Request to Proceed in Forma Pauperis was not completed in its entirety.
- ☒ (c) You did not submit a Certificate of Prisoner's Funds completed and signed by an authorized officer at the prison.
- ☐ (d) You did not use the correct form. You must submit this court's current Declaration in Support of Request to Proceed in Forma Pauperis.
- ☐ (e) Other: \_\_\_\_\_

Enclosed you will find this court's current Prisoner's Declaration in Support of Request to Proceed in Forma Pauperis, which includes a Certificate of Funds in Prisoner's Account Form.

Sincerely,

Clerk, U.S. District Court

CSAWYER

By: \_\_\_\_\_

Deputy Clerk



SHERRI R. CARTER

District Court Executive  
and Clerk of Court

UNITED STATES DISTRICT COURT  
CENTRAL DISTRICT OF CALIFORNIA  
WESTERN DIVISION  
312 North Spring Street, Room G-8 Los  
Angeles, CA 90012  
Tel: (213) 894-7984

SOUTHERN DIVISION  
411 West Fourth Street, Suite 1053  
Santa Ana, CA 92701-4516  
(714) 338-4570

EASTERN DIVISION  
3470 Twelfth Street, Room 134  
Riverside, CA 92501  
(951) 328-4450

Thursday, November 01, 2007

ISAGANI DE LA PENA  
#00944-093  
P. O. BOX 5300  
ADELANTO, CA 92301

Dear Sir/Madam:

A ☒ Petition for Writ of Habeas Corpus was filed today on your behalf and assigned civil case number  
CV07- 7150 R (AGR)

A ☐ Motion pursuant to Title 28, United States Code, Section 2255, was filed today in criminal case  
number and also assigned the civil case number

Please refer to these case numbers in all future communications.

Please Address all correspondence to the attention of the Courtroom Deputy for:

☐ District Court Judge \_\_\_\_\_

☒ Magistrate Judge Alicia G. Rosenberg

at the following address:

☒ U.S. District Court  
312 N. Spring Street  
Civil Section, Room G-8  
Los Angeles, CA 90012

☐ Ronald Reagan Federal  
Building and U.S. Courthouse  
411 West Fourth St., Suite 1053  
Santa Ana, CA 92701-4516  
(714) 338-4750

☐ U.S. District Court  
3470 Twelfth Street  
Room 134  
Riverside, CA 92501

The Court must be notified within fifteen (15) days of any address change. If mail directed to your address of record is returned undelivered by the Post Office, and if the Court and opposing counsel are not notified in writing within fifteen (15) days thereafter of your current address, the Court may dismiss the case with or without prejudice for want of prosecution.

Very truly yours,

Clerk, U.S. District Court

By: CSAWYER  
Deputy Clerk

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8 **UNITED STATES DISTRICT COURT**  
9 **CENTRAL DISTRICT OF CALIFORNIA**  
10 **WESTERN DIVISION**  
11

12 ISAGANI DE LA PENA,

13 Petitioner,

14 v.

15 S. A. HOLENCIK,

16 Respondent.  
17

) No. CV 07-7150-R (AGR)

) **ORDER REQUIRING RESPONSE TO**  
) **PETITION (FEDERAL CUSTODY)**

18 Petitioner has filed a Petition for Writ of Habeas Corpus pursuant to 28 U.S.C. § 2241. In  
19 order to facilitate the just, speedy, and inexpensive determination of this action, **IT IS ORDERED**  
20 that:

21 1. The Clerk of this Court shall promptly (a) serve a copy of the Petition and a copy of  
22 this Order on respondent and the United States Attorney, or his authorized agent, in accordance  
23 with Rule 4(i) of the Federal Rules of Civil Procedure; and (b) serve a copy of this Order on  
24 petitioner.

25 2. Within 14 days, Respondent shall serve and file a Notice of Appearance  
26 notifying the Court of the name of the attorney who will have principal charge of the case,  
27 together with the address where the attorney may be served, and the attorney's telephone  
28 and fax number.

1           3.     If respondent contends that the Petition can be decided without the Court reaching  
2 the merits of petitioner's claims (e.g., because respondent contends that petitioner has failed to  
3 exhaust any administrative remedies as to any ground for relief alleged in the Petition, or that the  
4 Petition is barred by the statute of limitations), respondent shall file a motion to dismiss **no later**  
5 **than 30 days of the date of this Order**. The motion to dismiss shall not address the merits of  
6 petitioner's claims, but rather shall be confined to the basis for respondent's contention that  
7 dismissal without reaching the merits of petitioner's claims is warranted.<sup>1</sup> At the time the motion  
8 to dismiss is filed, respondent shall lodge with the Court all records bearing on respondent's  
9 contention in this regard.

10           4.     If respondent files a motion to dismiss, petitioner shall file his opposition, if any, to  
11 the motion within thirty (30) days of the date of service thereof.<sup>2</sup> At the time the opposition is filed,  
12 petitioner shall lodge with the Court any records not lodged by respondent which petitioner  
13 believes may be relevant to the Court's determination of the motion.

14           5.     Unless the Court orders otherwise, respondent shall not file a reply to petitioner's  
15 opposition to a motion to dismiss. If the motion is denied, the Court will afford respondent  
16 adequate time to respond to petitioner's claims on the merits.

17           6.     If respondent does not contend that the Petition can be decided without the Court  
18 reaching the merits of petitioner's claims, respondent shall file and serve an Answer to the Petition  
19 **no later than 45 days of the date of this Order**. At the time the Answer is filed, respondent  
20 shall lodge with the Court all records bearing on the merits of petitioner's claims. The Answer shall  
21 also specifically address the necessity for an evidentiary hearing to resolve any issue.

22           7.     Petitioner may file a single Reply responding to matters raised in the Answer within  
23 thirty (30) days of the date of service thereof. Any Reply filed by petitioner (a) shall state whether  
24

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25           <sup>1</sup>     If respondent contends that petitioner has failed to exhaust any administrative remedies as  
26 to any ground for relief alleged in the Petition, the motion to dismiss shall also specify the  
27 remedies still available to petitioner.

28           <sup>2</sup>     As used herein, "date of service" refers to the date set forth in the Certificate of Service  
attached to the document served. It does not refer to the date the document is actually received.

1 petitioner admits or denies each allegation of fact contained in the Answer; (b) shall be limited to  
2 facts or arguments responsive to matters raised in the Answer; and (c) shall not raise new grounds  
3 for relief that were not asserted in the Petition. Grounds for relief withheld until the Reply will not  
4 be considered, unless the Court grants leave to amend the Petition. No Reply shall exceed ten  
5 (10) pages in length absent advance leave of Court for good cause shown.

6 8. A request by a party for an extension of time within which to file any of the pleadings  
7 required hereunder will be granted only upon a showing of good cause, and should be made in  
8 advance of the due date of the pleading. Any such request shall be accompanied by a declaration  
9 explaining why an extension of time is necessary and by a proposed form of order granting the  
10 requested extension.

11 9. Unless otherwise ordered by the Court, this case shall be deemed submitted on the  
12 day following the date petitioner's opposition to a motion to dismiss and/or Reply is due.

13 10. Every document delivered to the Court must include a certificate of service attesting  
14 that a copy of such document was served on opposing counsel (or on the opposing party, if such  
15 party is not represented by counsel). Any document delivered to the Court without a certificate  
16 of service may be returned to the submitting party and without consideration by the Court.

17 11. Respondent shall, in every pleading it files with the Court that includes exhibits, tab  
18 those exhibits in such a manner that they can be readily identified and accessed by the Court. In  
19 addition, respondent shall label each document lodged with the Court with the corresponding  
20 number of the document indicated in the Notice of Lodgement. For example, if the Abstract of  
21 Judgment is designated as the first document listed in the Notice of Lodgement, then the Abstract  
22 of Judgment shall be labeled "Lodged Document No. 1", etc.

23 12. Petitioner shall submit one (1) original and one (1) copy (or, if petitioner wishes to  
24 receive a conformed copy, one (1) original and two (2) copies) of all documents filed with the  
25 Court. The clerk will not make photocopies of documents except for good cause shown.  
26 Petitioner is reminded that he or she must sign the original document.



1           13.     Petitioner shall immediately notify the Court and counsel for respondents of any  
2 change of petitioner's address. If petitioner fails to keep the Court informed of where petitioner  
3 may be contacted, this action will be subject to dismissal. for failure to prosecute.  
4  
5  
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7  
8 DATED: November 13, 2007

*Alicia G. Rosenberg*

---

ALICIA G. ROSENBERG  
UNITED STATES MAGISTRATE JUDGE

FILED

2007 NOV 28 PM 2:20

CLERK OF DISTRICT COURT  
CENTRAL DISTRICT OF CALIF.  
LOS ANGELES

BY

THOMAS P. O'BRIEN  
United States Attorney  
CHRISTINE C. EWELL  
Assistant United States Attorney  
Chief, Criminal Division  
ERIC D. VANDEVELDE (Cal. Bar No. 240699)  
Assistant United States Attorney  
1200 United States Courthouse  
312 North Spring Street  
Los Angeles, California 90012  
Telephone: (213) 894-2576  
Facsimile: (213) 894-0141  
E-mail: eric.vandavelde@usdoj.gov

Attorneys for Respondent  
S. A. Holencik

UNITED STATES DISTRICT COURT

FOR THE CENTRAL DISTRICT OF CALIFORNIA

ISAGANI DE LA PENA,	)	No. CV 07-7150-R (AGR)
	)	
Petitioner,	)	<u>NOTICE OF ATTORNEY APPEARANCE</u>
	)	<u>FOR RESPONDENT</u>
v.	)	
	)	
S. A. HOLENCIK,	)	
	)	
Respondent.	)	

Pursuant to the court's order of November 13, 2007,  
Respondent, S. A. Holencik, through his attorney of record, the  
United States Attorney's Office for the Central District of  
California, hereby advises the court that Assistant United States  
Attorney ("AUSA") Eric D. Vandavelde will have principal charge

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DOCKETED ON CM  
NOV 29 2007  
BY *pc*

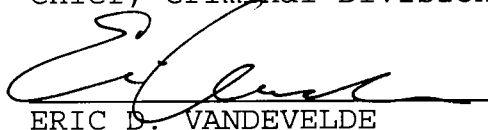
*04*

1 of this matter. Contact information for AUSA Vandeveld is  
2 listed above.

3 Dated: November 28, 2007      Respectfully submitted,

4                                      THOMAS P. O'BRIEN  
5                                      United States Attorney

6                                      CHRISTINE C. EWELL  
7                                      Assistant United States Attorney  
8                                      Chief, Criminal Division

9                                        
10                                     ERIC D. VANDEVELDE

11                                     Assistant United States Attorney

12                                     Attorneys for Respondent  
13                                     S. A. Holencik

CERTIFICATE OF SERVICE

I, **ALEX SILVERIO**, declare:

That I am a citizen of the United States and resident or employed in Los Angeles County, California; that my business address is the Office of United States Attorney, United States Courthouse, 312 North Spring Street, Los Angeles, California 90012; that I am over the age of eighteen years, and am not a party to the above-entitled action;

That I am employed by the United States Attorney for the Central District of California who is a member of the Bar of the United States District Court for the Central District of California, at whose direction I served a copy of: **NOTICE OF ATTORNEY APPEARANCE FOR RESPONDENT**

☐ Placed in a closed envelope, for collection and interoffice delivery addressed as follows:

☒ Placed in a sealed envelope for collection and mailing via United States Mail, addressed as follows:

☐ By hand delivery addressed as follows:

☐ By facsimile as follows:

☐ By messenger as follows:

☐ By federal express as follows:

**ISAGANI DE LA PENA  
REG. NO. 00944-093  
FCI VICTORVILLE MEDIUM I  
FEDERAL CORRECTIONAL INSTITUTION  
P.O. BOX 5300  
ADELANTO, CA 92301**

This Certificate is executed on **NOVEMBER 28, 2007**, at Los Angeles, California.

I certify under penalty of perjury that the foregoing is true and correct.

  
\_\_\_\_\_  
**ALEX SILVERIO**

UNITED STATES DISTRICT COURT  
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES - GENERAL

Case No. CV 07-7150-R (AGR)

Date December 5, 2007

Title Isagani de la Pena v. S. A. Holencik

Present: The  
Honorable

Alicia G. Rosenberg, United States Magistrate Judge

Marine Pogosyan

n/a

n/a

Deputy Clerk

Court Reporter / Recorder

Tape No.

Attorneys Present for Petitioner:

Attorneys Present for Respondent:

None

None

Proceedings: In Chambers **PETITION FOR WRIT OF HABEAS CORPUS**

On October 31, 2007, Petitioner filed a Petition for Writ of Habeas Corpus Pursuant to 28 U.S.C. § 2241 by a Person in Federal Custody ("Petition"). The Petition alleges two grounds for relief.

Ground One refers to an "accompanying memorandum." (Petition at 3.) However, Petitioner did not file a memorandum with his Petition.

IT IS HEREBY ORDERED that Petitioner may file the "accompanying memorandum" referenced on Page 3 of his Petition on or before **January 7, 2008**. The time for Respondent to file a motion to dismiss or answer pursuant to Paragraphs 3 and 6 of the Order filed November 13, 2007, shall run from the date of service of Petitioner's accompanying memorandum unless otherwise ordered by the Court. In all other respects, the provisions of the Order filed November 13, 2007, shall remain in effect.

cc: The Parties

Initials of Preparer

0 : 0  
mp

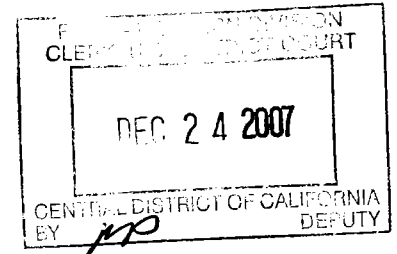
Isagani De La Pena

Reg. No. 00944-093

Federal Correctional Institution

P.O. Box 5300

Adelanto, CA 92301



UNITED STATES DISTRICT COURT  
CENTRAL DISTRICT OF CALIFORNIA

Isagani De La Pena, ) C.A. No. CV 07-7150-R (AGR)  
Petitioner, ) Cr No. 00-001261 (D.Guam)  
vs. )  
 ) MEMORANDUM IN SUPPORT OF  
 )  
S.A. HOLENCIK, Warden, ) 28 U.S.C. §2241 PETITION  
Respondent. )  
\_\_\_\_\_ )

I. INTRODUCTION

On October 22, 2001, Isagani De La Pena was convicted of the following criminal offenses:

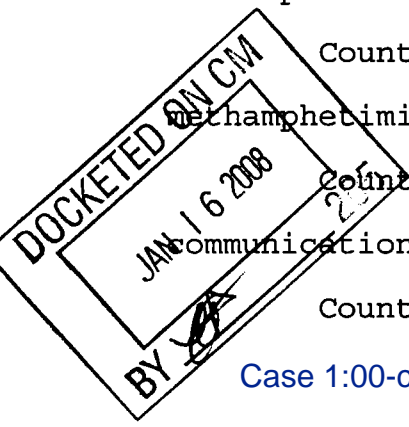
Count I -- 21 U.S.C. §841(a)(1) and 846 (conspiracy to distribute methamphetimine).

Count II -- 21 U.S.C. §841(a)(1) (distribution of methamphetimine).

Count III -- 21 U.S.C. §860 (distribution of methamphetimine within 1000 feet of a playground).

Count IV -- 21 U.S.C. §841(b) -- (unlawful use of a communication device).

Count V -- 18 U.S.C. §922(g)(1) and 924(a)(2) --



#6

(Felon in possession of a firearm).

Count VI -- 18 U.S.C. §922(3) and §924(a)(2)  
(possession of firearm by an unlawful drug user).

Mr. De La Pena subsequently appealed to the United States Court of Appeals for the Ninth Circuit where his conviction and sentence were affirmed on February 26, 2003. Mr. De La Pena then submitted a motion pursuant to 28 U.S.C. §2255 which was denied on July 7, 2005. The issue presented in this habeas petition has not been previously raised.

This Petition concerns Counts II and III above. Because Count II is a lesser offense of Count III, Mr. De La Pena's conviction and sentence violate the Double Jeopardy Clause of the Constitution of the United States of America.

Post-Conviction judicial interpretation of statute, combined with ineffective assistance of trial and appellate counsel has resulted in Mr. De La Pena having never been afforded an unobstructed procedural opportunity to challenge this constitutional deficiency in his conviction and sentence.

## II.

### ARGUMENT

(A) SIMULTANEOUS CONVICTIONS FOR DISTRIBUTION  
WITHIN 1000 FEET OF PLAYGROUND AND THE LESSER  
OFFENSE OF SIMPLE DISTRIBUTION VIOLATE THE  
DOUBLE JEOPARDY CLAUSE

Recent caselaw makes clear that Mr. De La Pena's simultaneous convictions for 21 U.S.C. 860 (distribution of methamphetamine within 1000 feet of a playground) (Count III)



and 21 U.S.C. 841(a)(1), (distribution of methamphetamine) (Count II), constitute a violation of the Double Jeopardy Clause. See United States v. Perry, 389 F.Supp.2d 278, 285 (D.R.I.2005) (Statute prohibiting knowing possession of a controlled substance with intent to distribute, §841(a)(1), is a lesser included offense of §860, the statute prohibiting possession of a controlled substance within 1000 feet of a school, and thus conviction for both offenses constitutes a violation of the Double Jeopardy Clause, and requires vacation of of conviction as to the lesser offense) (citing cases). Accord United States v. Cabbaccang, 481 F.3d 1176, 1180 (9th Cir.2007) (Cabbaccang III) (lesser-included offenses of simultaneous convictions must be vacated), (citing United States v. Rutledge, 517 US 292, 307 (1996)) (one of the convictions and its concurrent sentence must be vacated).

The fact that Mr. De La Pena's convictions for Counts II and III constitute multiple punishments for the same offense in violation of the Double Jeopardy Clause is well-settled law at this time and cannot be disputed.

(B) 28 U.S.C. §2241 IS THE PROPER VEHICLE FOR  
MR. DE LA PENA'S DOUBLE JEOPARDY CLAIM

In general, §2255 "provides the exclusive procedural mechanism" by which a federal prisoner may test the legality of his detention. However, a prisoner may proceed under §2241 if he can show that "the remedy by motion [under §2255] is inadequate or ineffective to test the legality of his detention". Ivy v. Pontesso, 328 F.3d 1057, 1059 (9th Cir.2003) (Quoting 28 U.S.C. §2255 ¶5).

Mr. De La Pena, pro se, filed his initial 28 U.S.C. §2255 motion on January 23, 2004. At that time, the instructive case relied upon above, United States v. Perry, had not yet been published. Thus, Mr. De La Pena submits that his double jeopardy claim should be permitted to proceed under the habeas corpus statute, 28 U.S.C. §2241, pursuant to the "Savings Clause" of 28 U.S.C. §2255 ¶5. See Ivy v. Pontesso, 328 F.3d at 1060 ("§2255 provides an 'inadequate or ineffective' remedy [and thus petitioner may proceed under 28 U.S.C. §2241, pursuant to the 'savings clause'] when the petitioner claims to be: (1) legally innocent of the crime for which he has been convicted; and (2) has never had an 'unobstructed procedural shot' at presenting this claim") (citing cases). (Quoting Lorentsen v. Hood, 223 F.3d 950, 954 (2000)).

Mr De La Pena is clearly "legally innocent" of the lesser offense. He cannot now successfully file a second §2255 motion. He is procedurally barred because his claim is not based on newly discovered evidence, or a new rule of constitutional law made retroactive on collateral review as is required to file a second motion under §2255 ¶8. Courts have allowed petitions to proceed under §2241 when the defendants has "been convicted on the basis of an incorrect understanding [of the law], and §2255 relief is unavailable to him." United States v. Smith, 285 F.3d 6, 8 (D.C. Cir.2002)

(C)           INEFFECTIVE ASSISTANCE HAS RESULTED IN  
MR. DE LA PENA NEVER HAVING AN OPPORTUNITY  
TO RAISE THIS ISSUE BY MOTION

Mr De La Pena's trial counsel did not object to the aforementioned multiple convictions for a single offense, nor did his appellate counsel raise the issue on appeal. There was readily available controlling law available at the time of Mr. De La Pena's conviction and direct appeal. See United States v. Kakatin, 214 F.3d 1049, 1051 (9th Cir.2000) ("We agree with Defendant, as does the government, that §841(a) is a lesser-included offense of the crime described in §860.") (citing United States v. Freyre-Lazaro, 3 F.3d 1496, 1507 (11th Cir.1993); Schmuck v. United States, 489 US 705, 716 (1989)).

Although the Ninth circuit case mentioned above is arguably mere dicta, and Mr. De La Pena does argue as much for the purpose of whether the double jeopardy caselaw relied upon here is actually a post-conviction judicial interpretation or not, the non-controlling cases cited in Kakatin are clearly not mere dicta and would have been readily available to any diligent legal researcher.

The fact that Mr. De La Pena's former counsel failed to raise the double jeopardy issue discussed above, or the separate statutory violation of multiple convictions for the possession of a single firearm that Mr. De La Pena suffered when he was convicted of both Count V (18 U.S.C. 922(g) (1) -- felon in possession) and Count VI (18 U.S.C 922(g) (3) -- possession of the same .25 caliber pistol by an unlawful drug

user), clearly falls "below an objective standard of reasonableness" that is required to show ineffective assistance of counsel. Strickland v. Washington, 466 US 668, 688 (1984). See United States v. Shea, 211 F.3d 658, 673 (1st Cir.2000) (cert denied 531 US 1154 (2001)) (citing cases) ("[C]ongress did not intend to inflict multiple punishments where a drug using, former felon possessed a firearm."). Accord United States v. Keen, 104 F.3d 1111, 1120 (9th Cir.1996).

Surely, had counsel apprised himself of the law, Mr. De La Pena would not now stand convicted of 28 U.S.C. §841(a) (1) or 18 U.S.C. §922(g) (3). See People of Territory of Guam v. Torre, 68 F.2d 1177, 1180 (9th Cir.1995) (district court erred in holding that defendant was not prejudiced by counsel's failure to object to multiple convictions even though sentences ran concurrent). Counsel's failure to object to the double jeopardy violation in the present case clearly shows the "reasonable probability" of different outcome required to obtain relief from counsel's unprofessional errors. Strickland, at 694.

The complete oversight on the part of Mr. De La Pena's counsel cannot be construed as any sort of sound strategy that could excuse the failure. See Wiggins v. Smith, 539 US 510, 526 (2003) ("The record of the actual [] proceedings underscores the unreasonableness of counsel's conduct by suggesting their failure [] resulted from inattention, not reasoned strategic judgement."). Accord Kimmelman v. Morrison, 477 US 365, 385 (1986) (a mistake made out of ignorance rather than strategy cannot later be

validated as tactically defensible). Counsel's failure to object at trial and/or raise on appeal Mr. De La Pena's double jeopardy/multiple punishment issues is a strategy that no reasonably competent attorney would have adopted under the circumstances. And the result of this ineffectiveness is that Mr. De La Pena has never had his "unobstructed procedural shot" at challenging the unconstitutional convictions for which he is "legally innocent".

(D) RESENTENCING UNDER THE NOW ADVISORY  
GUIDELINES IS REQUIRED

The double jeopardy violation arising out of Mr. De La Pena's conviction under both §841(a)(1) and §860 cannot be remedied merely because his sentences were ran concurrent. The Supreme Court has noted:

[t]he second conviction, whose concomitant sentence, is served concurrently, does not evaporate simply because of the concurrence of the sentence.

Rutledge, 517 US at 302 (quoting Ball v. United States, 470 US 856, 864-65 (1985)).

Because the conviction for §841(a)(1) must be vacated, the district court is required to resentence Mr. De La Pena. See United States v. Kincaid, 898 F.2d 110, 112 (9th Cir.1990) (resentencing is required after vacation of any one of multiple convictions or sentences, even if ran concurrently). Accord United States v. Allen, 88 F.3d 765, 768, 772 (9th Cir.1996) (same). Moreover, the United States Sentencing Guidelines are now advisory, thus Mr. De La Pena

has a right to be resentenced under the advisory Guidelines scheme. See United States v. Hicks, 472 F.3d 1167, 1170 (9th Cir.2006) (Guidelines are no longer mandatory in any context, all resentencing must proceed under the advisory, rather than the mandatory, Guidelines scheme, even though the defendant was initially sentenced under the mandatory Guidelines).

III.

CONCLUSION

Mr. De La Pena's conviction for 21 U.S.C. §841(a)(1) must be vacated and this case must be remanded to the district court of Guam for resentencing under the now advisory Guidelines.

DATED this 16th day of December, 2007

Isagani De La Pena

Isagani De La Pena  
Petitioner/Movant  
Propria Persona

Isagani De La Pena hereby declares on pain of perjury that he placed copies of the foregoing in the legal mail system at FCI-Victorville I first class or greater postage pre-paid, addressed to:

Clerk's Office  
312 N. Spring St.  
Los Angeles, CA 90012

U.S. Attorney's Office  
312 N. Spring St., 12th Fl.  
Los Angeles, CA 90012

S.A. HOLENCIK, Warden  
Federal Correctional Institution  
P.O. Box 5300  
Adelanto, CA 92301

on 12-17-07, 2007

Isagani De La Pena

Isagani De La Pena  
Petitioner/Movant  
Propria Persona



1 THOMAS P. O'BRIEN  
United States Attorney  
2 CHRISTINE C. EWELL  
Assistant United States Attorney  
3 Chief, Criminal Division  
ERIC D. VANDEVELDE (Cal. Bar No. 240699)  
4 Assistant United States Attorney  
General Crimes Section  
5 1200 United States Courthouse  
312 North Spring Street  
6 Los Angeles, California 90012  
Telephone: (213) 894-2576  
7 Facsimile: (213) 894-0141  
E-mail: eric.vandeveld@usdoj.gov

8  
9 Attorneys for Respondent  
S. A. Holencik

10 UNITED STATES DISTRICT COURT  
11  
12 FOR THE CENTRAL DISTRICT OF CALIFORNIA

13	ISAGANI DE LA PENA,	)	No. CV 07-7150-R (AGR)
14	Petitioner.	)	
15	v.	)	<u>GOVERNMENT'S MOTION TO DISMISS</u>
16	S. A. HOLENCIK,	)	<u>PETITION FOR WRIT OF HABEAS</u>
17	Respondent.	)	<u>CORPUS PURSUANT TO 28 U.S.C.</u>
18		)	<u>§ 2241; DECLARATION OF ERIC D.</u>
		)	<u>VANDEVELDE; EXHIBITS</u>

19 Respondent, S. A. Holencik, through his attorney of record,  
20 the United States Attorney for the Central District of  
21 California, hereby respectfully moves to dismiss petitioner's  
22 petition for writ of habeas corpus under 28 U.S.C. § 2241. This  
23 motion is based upon the attached memorandum of points and

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1 authorities, the records and file in this case, the accompanying  
2 Declaration of Eric D. Vandavelde and exhibits attached thereto,  
3 and such other evidence as may be presented to this Court.

4 Dated: January 16, 2008

Respectfully submitted,

5  
6 THOMAS P. O'BRIEN  
United States Attorney

7 CHRISTINE C. EWELL  
8 Assistant United States Attorney  
Chief, Criminal Division

9  
10 /s/  
11 ERIC D. VANDEVELDE  
Assistant United States Attorney

12 Attorneys for Respondent  
13 S. A. Holencik  
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1                                    MEMORANDUM OF POINTS AND AUTHORITIES

2    I.    INTRODUCTION

3            In May 2001, a jury sitting in the District of Guam  
4 convicted petitioner Isagani De La Pena ("petitioner") on all  
5 counts of a six-count indictment. The court sentenced petitioner  
6 to six concurrent terms of imprisonment, three of which were 365  
7 months in length. Petitioner appealed directly and later filed a  
8 motion under 28 U.S.C. § 2255 in the District of Guam. Neither  
9 were successful.

10           Now incarcerated in the Central District of California,  
11 petitioner filed the instant petition for a writ of habeas corpus  
12 under 28 U.S.C. § 2241 ("Petition"), wherein he attacks the  
13 legality of two counts of conviction -- i.e., distribution of  
14 methamphetamine and possession of a firearm by a felon. First,  
15 he contends that these offenses are lesser included offenses of  
16 two other counts of conviction -- i.e., distribution of  
17 methamphetamine near a school and possession of a firearm by an  
18 unlawful drug user. Second, he contends that he was denied the  
19 effective assistance of counsel due to counsel's failure to  
20 object to any conviction on a lesser included offense.

21           The instant Petition should be dismissed for lack of  
22 jurisdiction. Petitioner challenges the validity of his  
23 convictions and sentence, not the manner in which his sentence is  
24 being executed. These claims are not properly before this Court  
25 on a motion under § 2241; rather, they must be raised on a motion  
26 under § 2255. And the law is clear that the proper venue for a  
27 § 2255 motion lies not in the district of incarceration (i.e.,  
28 this district), but rather the district in which petitioner was

1 convicted and sentenced (i.e., the District of Guam). Moreover,  
2 while the "savings clause" of § 2255 permits federal prisoners to  
3 resort to § 2241 in the district of incarceration if it "appears  
4 that the remedy by motion [under § 2255] is inadequate or  
5 ineffective to test the legality of [their] detention,"  
6 petitioner cannot show that the savings clause applies here. He  
7 is not "actually innocent" of any lesser included offense; nor  
8 can he claim never to have had an "unobstructed procedural shot"  
9 to challenge his conviction on such an offense.

10 Accordingly, this Court should dismiss the Petition for lack  
11 of jurisdiction.

12 **II. STATEMENT OF FACTS AND PROCEDURAL HISTORY**

13 **A. Conviction in the District of Guam**

14 On November 1, 2000, petitioner was charged by indictment  
15 with the following six counts:

- 16 (1) conspiracy to distribute methamphetamine, in violation  
17 of 21 U.S.C. §§ 846, 841(a)(1);
- 18 (2) distribution of methamphetamine, in violation of 21  
19 U.S.C. § 841(a)(1);
- 20 (3) distribution of methamphetamine near a school, in  
21 violation of 21 U.S.C. § 860;
- 22 (4) unlawful use of a communication facility to facilitate  
23 a drug crime, in violation of 21 U.S.C. § 843(b);
- 24 (5) possession of a firearm by a felon, in violation of 18  
25 U.S.C. § 922(g)(1); and
- 26 (6) possession of a firearm by an unlawful drug user, in  
27 violation of 18 U.S.C. § 922(g)(3).

28 See Decl. of Eric D. Vandeveld, Ex. A (criminal docket from

1 United States v. De La Pena, No. CR 00-126 (D. Guam)) at Docket  
2 Item No. 1.

3 On May 7, 2001, after a seven day jury trial, a jury  
4 convicted petitioner on all counts. See Id. at Docket Item No.  
5 97.

6 On October 9, 2001, petitioner was sentenced to 365 months  
7 imprisonment for each of Counts 1-3, 48 months imprisonment for  
8 Count 4, and 120 months imprisonment for each of Counts 5-6. See  
9 Id. at 2 & Docket Item No. 114. All terms of imprisonment were  
10 ordered to run concurrently.

#### 11 **B. Direct Appeal**

12 On November 7, 2001, petitioner filed a notice of appeal.  
13 Id. at Docket Item No. 119. Petitioner challenged the  
14 introduction at trial of expert urinalysis testimony, as well as  
15 physical evidence obtained from searches of petitioner's house  
16 and car. United States v. De La Pena, 62 Fed. Appx. 754, 755-56  
17 (9th Cir. 2003) (unpublished). He also argued that the  
18 prosecution had failed to present sufficient evidence to support  
19 a conviction on the conspiracy charge, that his sentence was  
20 unconstitutional under Apprendi v. New Jersey, 530 U.S. 466  
21 (2000), and that the district court should have declared a  
22 mistrial. De La Pena, 62 Fed. Appx. at 756-57. On February 26,  
23 2003, the Ninth Circuit affirmed defendant's convictions and  
24 sentence in all respects. Id. at 755-57.

#### 25 **C. Post-Appeal Collateral Attacks**

26 On January 23, 2004, petitioner filed in the District of  
27 Guam a motion under 28 U.S.C. § 2255 to vacate, set aside, or  
28 correct his sentence. See Decl. of Eric D. Vandeveld, Ex. A at

1 Docket Item No. 138. According to the form accompanying the  
2 instant Petition, petitioner states that this first § 2255 motion  
3 alleged violations of the Speedy Trial Act as well as  
4 petitioner's Fifth Amendment privilege against self-  
5 incrimination. On July 7, 2005, the district court denied  
6 petitioner's motion. Id. at Docket Item No. 147.

7 On August 15, 2005, petitioner filed a notice of appeal and  
8 motion for certificate of appealability regarding the denial of  
9 his § 2255 motion. See Id. at Docket Item No. 148. On March 23,  
10 2006, petitioner filed a motion for "Accelerated Adjudication" of  
11 his earlier motion for certificate of appealability. See Id. at  
12 Docket Item No. 150. On March 31, 2006, the district court  
13 denied both motions. See Id. at Docket Item No. 152; see also  
14 United States v. De La Pena, No. CR 00-00126, 2006 WL 860719 (D.  
15 Guam Mar. 31, 2006). On October 10, 2006, the Ninth Circuit also  
16 denied petitioner's request for a certificate of appealability.  
17 See Decl. of Eric D. Vandeveld, Ex. A at Docket Item No. 155.

18 **D. Instant Petition**

19 On October 31, 2007, petitioner filed the instant Petition  
20 under 28 U.S.C. § 2241 in the Central District of California.  
21 Petitioner presents essentially one argument -- that he was  
22 improperly convicted of two lesser included offenses.  
23 Specifically, he contends that:

- 24 1) Count 2, distribution of methamphetamine (21 U.S.C. §  
25 841(a)(1)), is a lesser included offense of Count 3,  
26 distribution of methamphetamine near a school (21  
27 U.S.C. § 860);

28 //

1        2)    Count 5, possession of a firearm by a felon (18 U.S.C.  
2        § 922(g)(1)), is a lesser included offense of Count 6,  
3        possession of a firearm by an unlawful drug user (18  
4        U.S.C. § 922(g)(3)); and

5        3)    competent counsel would have objected to any conviction  
6        on a lesser included offense.

7    **III. ARGUMENT**

8        **A.    The Petition Must Be Dismissed Because It Attacks**  
9        **Petitioner's Conviction and Sentence, And § 2255 Is The**  
10       **Proper Vehicle For Such Attacks.**

11       Petitioner seeks to challenge not the manner in which his  
12       sentence is being executed, but rather the validity of his  
13       convictions and sentence.

14       It is well settled that a motion under § 2255 is the primary  
15       avenue for federal prisoners to attack their sentences and  
16       underlying convictions:

17       An application for a writ of habeas corpus [under 28  
18       U.S.C. § 2241] in [sic] behalf of a prisoner who is  
19       authorized to apply for relief by motion pursuant to  
20       this section, shall not be entertained if it appears  
21       that the applicant has failed to apply for relief, by  
22       motion, to the court which sentenced him, or that such  
23       court has denied him relief . . . .

24       28 U.S.C. § 2255 ¶ 5 (emphasis added); see also Ivy v. Pontesso,  
25       328 F.3d 1057, 1059 (9th Cir. 2003); Lorentsen v. Hood, 223 F.3d  
26       950, 953 (9th Cir. 2000) ("In general, § 2255 provides the  
27       exclusive procedural mechanism by which a federal prisoner may  
28       test the legality of detention.")

1 A habeas petition under § 2241, by contrast, is designed to  
2 "challenge the manner, location, or conditions of a sentence's  
3 execution . . . ." Hernandez v. Campbell, 204 F.3d 861, 864 (9th  
4 Cir. 2000) (per curiam). Here, petitioner is challenging the  
5 validity of his convictions and sentence. Thus, his Petition is  
6 properly construed as a motion filed pursuant to 28 U.S.C.  
7 § 2255.

8 A motion under § 2255, however, must be brought before the  
9 court in the sentencing district. Hernandez, 204 F.3d at 865.  
10 Because petitioner was convicted and sentenced in the District of  
11 Guam, his Petition is not properly before the Central District of  
12 California and therefore should be dismissed for lack of  
13 jurisdiction.

14 **B. Petitioner Has Not Shown That § 2255's "Savings Clause"**  
15 **Applies.**

16 While petitions filed under § 2241 are generally not proper  
17 to challenge a conviction or sentence, Congress has recognized  
18 that there could be some rare instances in which it would be  
19 appropriate to allow a district court to exercise its residual  
20 power under § 2241 to hear claims of federal prisoners  
21 challenging their convictions or sentences. Accordingly,  
22 Congress built into § 2255 a "savings clause" that permits  
23 federal prisoners to resort to § 2241 if it "appears that the  
24 remedy by motion [under § 2255] is inadequate or ineffective to  
25 test the legality of [their] detention." 28 U.S.C. § 2255 ¶ 5;  
26 see also United States v. Hayman, 342 U.S. 205, 219 (1952)  
27 (affirming the validity of the "savings clause"). The savings  
28 clause, however, is to be construed narrowly. See United States



1 v. Pirro, 104 F.3d 297, 299 (9th Cir. 1997). The burden is on  
2 the petitioner to show that the remedy under § 2255 is  
3 "inadequate or ineffective." See Redfield v. United States, 315  
4 F.2d 76, 83 (9th Cir. 1963).

5 Thus, when a federal inmate files a petition that is labeled  
6 as being brought pursuant to § 2241, but that actually seeks to  
7 attack the legality of his conviction or sentence, the district  
8 court must first determine whether it has jurisdiction to  
9 entertain the petition by conducting an inquiry into whether the  
10 petition falls within the savings clause or whether it properly  
11 should be construed as a § 2255 motion. Hernandez, 204 F.3d at  
12 865.

13 In construing an inmate's filing, a district court is not  
14 bound by the label given the petition and must look instead to  
15 its substance. See Porter v. Adams, 244 F.3d 1006, 1007 (9th  
16 Cir. 2001) (examining gravamen of defendant's claims to determine  
17 whether they should have been brought pursuant to § 2241 or  
18 § 2255). The Ninth Circuit has explained that § 2255's savings  
19 clause has been reserved for the rare case in which (1) a  
20 defendant lacks an "unobstructed procedural shot" to present a  
21 claim that (2) he is "actually innocent" of the convicted  
22 offense. See Ivy, 328 F.3d at 1059-61 (emphasis added);  
23 Lorentsen, 223 F.3d at 954.

24 Here, petitioner already had the opportunity to challenge  
25 his convictions and sentence on the grounds identified in the  
26 instant Petition. Moreover, even assuming he never had that  
27 opportunity, petitioner's challenge is not that he is actually  
28 //

1 innocent of any of the counts of conviction. Thus, the savings  
2 clause does not apply.

3           **1. Petitioner Had The Opportunity To Challenge**  
4           **His Convictions Of Any Lesser Included**  
5           **Offenses**

6           Petitioner claims that, at the time he filed his first  
7 § 2255 motion (January 2004), he could not have challenged his  
8 conviction for distribution of methamphetamine as a lesser  
9 included offense of distribution of methamphetamine near a  
10 school. He contends that such a challenge became possible only  
11 after the District of Rhode Island decision in United States v.  
12 Perry, 389 F.Supp.2d 278 (2005) (holding that 21 U.S.C. § 860  
13 includes the lesser offense of 21 U.S.C. § 841(a)(1)).  
14 Petitioner's contention that he never had an "unobstructed  
15 procedural shot" to make this argument is not true. Indeed, in  
16 addition to citing Perry, petitioner goes on to cite earlier  
17 Ninth Circuit authority for the same proposition. Specifically,  
18 he cites United States v. Kakatin, 214 F.3d 1049, 1051 (9th Cir.  
19 2000) (likewise holding that § 860 includes the lesser offense of  
20 § 841(a)(1)). Kakatin was decided **before** petitioner filed his  
21 first § 2255 motion, and indeed, **before** defendant was even  
22 indicted. Thus, petitioner did have an "unobstructed procedural  
23 shot" to challenge his conviction on any lesser included  
24 offense.<sup>1/</sup>

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25  
26           <sup>1/</sup> Petitioner cites no authority holding that Count 5,  
27 possession of a firearm by a felon (18 U.S.C. § 922(g)(1)), is a  
28 lesser included offense of Count 6, possession of a firearm by an  
unlawful drug user (18 U.S.C. § 922(g)(3)). While separate  
convictions under different subsections of § 922(g) for the same  
conduct are improper, the case law so holding likewise pre-dates

1                   2.     Petitioner Does Not Claim "Actual Innocence."

2           To fall within § 2255's savings clause, petitioner's claim  
3 must be one that he is actually innocent of the convicted  
4 offense. See Ivy, 328 F.3d at 1059-61 (emphasis added);  
5 Lorentsen, 223 F.3d at 954; see also Charles v. Chandler, 180  
6 F.3d 753, 757 (6th Cir. 1999) (per curiam) ("No circuit court has  
7 to date permitted a post-AEDPA petitioner who was not effectively  
8 making a claim of 'actual innocence' to utilize § 2241 (via  
9 § 2255's 'savings clause') as a way of circumventing § 2255's  
10 restriction on the filing of second or successive habeas  
11 petitions."). A habeas petitioner bears the burden of  
12 demonstrating his "actual innocence" by a preponderance of the  
13 evidence. Lorentsen, 223 F.3d at 954.

14           Here, petitioner does not argue that he is "actually  
15 innocent" of any lesser included offense for which he was  
16 convicted. "'[A]ctual innocence' means **factual innocence**, not  
17 mere legal insufficiency," Bousley v. United States, 523 U.S.  
18 614, 623 (1998) (emphasis added), and petitioner does not  
19 identify any evidence to show he is factually innocent of his  
20 conviction for distribution of methamphetamine. Rather, his sole  
21 argument, a legal one, is that he is "legally innocent" of any  
22 lesser included offense. Petition at 4. Such a claim, however,  
23 is not one of actual innocence. Thus, for example, although  
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25 \_\_\_\_\_  
26 defendant's convictions. See, e.g., United States v. Shea, 211  
27 F.3d 658, 673 (1st Cir. 2000); United States v. Dunford, 148 F.3d  
28 385, 389 (4th Cir. 1998); United States v. Winchester, 916 F.2d  
601, 606 (11th Cir. 1990); United States v. Munoz-Romo, 989 F.2d  
757, 759 (5th Cir. 1993); United States v. Johnson, 130 F.3d  
1420, 1426 (10th Cir. 1997). Thus, defendant already had a  
procedural shot to present such a claim.

1 § 841(a)(1) may be, in fact, a lesser included offense of § 860,  
2 petitioner does not argue that he did not commit that offense or  
3 that that offense is no longer a crime. See Poindexter v. Nash,  
4 333 F.3d 372, 381-382 (2d Cir. 2003); see also Wofford v. Scott,  
5 177 F.3d 1236, 1244 (11th Cir. 1999).

6 As such, petitioner has failed to show that his Petition  
7 falls within the savings clause of § 2255.

8 **IV. CONCLUSION**

9 For the reasons noted above, the Petition should be  
10 dismissed in its entirety for lack of jurisdiction.<sup>2/</sup> If this  
11 Court denies the government's motion to dismiss, the government  
12 respectfully requests that the Court permit the government to  
13 submit further briefing on the merits of petitioner's claims.

14 Dated: January 16, 2008

Respectfully submitted,

15 THOMAS P. O'BRIEN  
16 United States Attorney

17 CHRISTINE C. EWELL  
18 Assistant United States Attorney  
Chief, Criminal Division

19 \_\_\_\_\_  
20 /s/  
ERIC D. VANDEVELDE  
21 Assistant United States Attorney

22 Attorneys for Respondent  
S. A. Holencik

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27 \_\_\_\_\_  
28 <sup>2/</sup> If Petitioner seeks to pursue this Petition in the  
District of Guam, he will first need to obtain a certificate of  
appealability. See Fed. R. App. P. 22(b).

1                                DECLARATION OF ERIC D. VANDEVELDE

2            I, ERIC D. VANDEVELDE, declare as follows:

3            1.    I have personal knowledge of the following facts.    If  
4 called and sworn as a witness, I could and would competently  
5 testify to these facts.

6            2.    I am an Assistant United States Attorney in the United  
7 States Attorney's Office for the Central District of California.    I  
8 have been designated as counsel in the matter entitled Isagani De  
9 Le Pena v. S. A. Holencik, No. CV 07-7150-R (AGR).    This  
10 declaration is made in support of the government's motion to  
11 dismiss.

12           3.    Attached hereto as Exhibit A is a true and correct copy  
13 of the criminal docket, as of January 9, 2008, in United States v.  
14 De La Pena, No. CR 00-126, from the District of Guam.

15           I declare under penalty of perjury under the laws of the  
16 United States that the foregoing is true and correct.    Executed at  
17 Los Angeles, California, on January 16, 2008.

18  
19                                

20                                ERIC D. VANDEVELDE  
21                                Assistant United States Attorney  
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# **Exhibit A**

CLOSED

**Civil/Criminal CM/ECF System  
District Court of Guam (Hagatna)  
CRIMINAL DOCKET FOR CASE #: 1:00-cr-00126 All Defendants**

Case title: USA v. Dela Pena

Date Filed: 11/01/2000

Date Terminated: 10/22/2001

Assigned to: John S. Unpingco

**Defendant**

**Isagani P. Dela Pena, JR. (1)**

*TERMINATED: 10/22/2001*

*also known as*

Gani (1)

*TERMINATED: 10/22/2001*

*also known as*

Egan (1)

*TERMINATED: 10/22/2001*

represented by **Curtis Charles Van de veld**

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**Pending Counts**

CONSPIRACY TO DISTRIBUTE  
METHAMPHETAMINE HYDROCHLORIDE  
(1)

DISTRIBUTION OF METHAMPHETAMINE  
HYDROCHLORIDE  
(2)

DISTRIBUTION OF METHAMPHETAMINE  
HYDROCHLORIDE NEAR A  
PLAYGROUND  
(3)

UNLAWFUL USE OF COMMUNICATION  
FACILITY TO FACILITATE DRUG CRIME  
(4)

POSSESSION OF A FIREARM BY A FELON  
(5)

POSSESSION OF A FIREARM BY AN  
UNLAWFUL DRUG USER  
(6)

**Disposition**

Defendant shall serve a term of 365 months for Counts 1, 2, and 3. For Count 4, defendant shall serve a term of 48 months and for Counts 5 and 6, the defendant shall serve a term of 120 months. All these terms of imprisonment are to be served concurr ently.

Defendant shall serve a term of 365 months for Counts 1, 2, and 3. For Count 4, defendant shall serve a term of 48 months and for Counts 5 and 6, the defendant shall serve a term of 120 months. All these terms of imprisonment are to be served concurr ently.

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Defendant shall serve a term of 365 months for Counts 1, 2, and 3. For Count 4, defendant shall serve a term of 48 months and for Counts 5 and 6, the defendant shall serve a term of 120



months. All these terms of imprisonment are to be served concurrently.

**Highest Offense Level (Opening)**

Felony

**Terminated Counts**

None

**Disposition****Highest Offense Level (Terminated)**

None

**Complaints**

None

**Disposition****Plaintiff**

USA

represented by **Marivic P. David**  
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**LEAD ATTORNEY**  
**ATTORNEY TO BE NOTICED**

Date Filed	#	Docket Text
11/01/2000	1	INDICTMENT - Summons issd & hrg set for 11/09/00 at 9:30 a.m.; [RMM EOD 11/02/2000] (ORIGINAL GCMS ENTRY 1-1) (cnv) (Entered: 11/01/2000)
11/03/2000	2	APPLICATION & Ord to Seal Rec; [RMM EOD 11/06/2000] (ORIGINAL GCMS ENTRY 2-1) (cnv) (Entered: 11/03/2000)
11/09/2000	3	MINUTE ENTRY - Initial Appearance/Arraignment - DFT enters plea of Not Guilty. Trial set for 01/11/01 - 9:30 a.m. DFT remanded to custody of U.S. Marshals; [MBA EOD 11/13/2000] (ORIGINAL GCMS ENTRY 3-1) (cnv) (Entered: 11/09/2000)
11/13/2000	4	ORDER - Jehan'ad Martinez apptd to rep t/DFT; [MBA EOD 11/13/2000] (ORIGINAL GCMS ENTRY 4-1) (cnv) (Entered: 11/13/2000)
11/13/2000	5	ORDER - Trial set for 01/11/01 - 9:30 a.m. P/T mtns due NLT 11/30/00 & hrd on 12/21/00 - 1:30 p.m. Trial docs due NLT 01/04/01; [MBA EOD 11/13/2000] (ORIGINAL GCMS ENTRY 5-1) (cnv) (Entered: 11/13/2000)
11/17/2000	6	RETURN Of Summons In A Crim Case - exec 11/09/00; [RSN EOD 11/17/2000] (ORIGINAL GCMS ENTRY 6-1) (cnv) (Entered: 11/17/2000)
11/20/2000	7	SUBSTITUTION of Cnsl & Ord - Gerald E. Gray retained as cnsl of rec for DFT; [MBA EOD 11/20/2000] (ORIGINAL GCMS ENTRY 7-1) (cnv) (Entered: 11/20/2000)
11/30/2000	8	NOTICE of Mtn and; [MBA EOD 12/01/2000] (ORIGINAL GCMS ENTRY 8-1) (cnv) (Entered: 11/30/2000)

11/30/2000	10	NOTICE of Mtn and; [MBA EOD 12/01/2000] (ORIGINAL GCMS ENTRY 9-1) (cnv) (Entered: 11/30/2000)
11/30/2000	12	NOTICE of Mtn and; [MBA EOD 12/01/2000] (ORIGINAL GCMS ENTRY 10-1) (cnv) (Entered: 11/30/2000)
11/30/2000	14	NOTICE of Mtn and; [MBA EOD 12/01/2000] (ORIGINAL GCMS ENTRY 11-1) (cnv) (Entered: 11/30/2000)
11/30/2000	16	AFFIDAVIT in Supt of Mtn for Return of Property ; [MBA EOD 12/01/2000] (ORIGINAL GCMS ENTRY 12-1) (cnv) (Entered: 11/30/2000)
12/01/2000	9	MOTION for Discovery & Inspection - Hrg set for 12/21/00 - 1:30 p.m.; [MBA EOD 12/01/2000] (ORIGINAL GCMS ENTRY 8-2) (cnv) (Entered: 12/01/2000)
12/01/2000	11	MOTION for Statement of Govt's Intention to Use Evidence - Hrg set for 12/21/00 - 1:30 p.m.; [MBA EOD 12/01/2000] (ORIGINAL GCMS ENTRY 9-2) (cnv) (Entered: 12/01/2000)
12/01/2000	13	MOTION to Suppress - Hrg set for 12/21/00 - 1:30 p.m.; [MBA EOD 12/01/2000] (ORIGINAL GCMS ENTRY 10-2) (cnv) (Entered: 12/01/2000)
12/01/2000	15	MOTION for Return of Property - Hrg set for 12/21/00 - 1:30 p.m.; [MBA EOD 12/01/2000] (ORIGINAL GCMS ENTRY 11-2) (cnv) (Entered: 12/01/2000)
12/04/2000	17	NOTICE of Mtn; [MBA EOD 12/06/2000] (ORIGINAL GCMS ENTRY 13-1) (cnv) (Entered: 12/04/2000)
12/04/2000	18	MOTION for P/T Conf -; [MBA EOD 12/06/2000] (ORIGINAL GCMS ENTRY 13-2) (cnv) (Entered: 12/04/2000)
12/14/2000	19	STIPULATED Reqt for Cont of Mtns Hrg Date; [MBA EOD 12/14/2000] (ORIGINAL GCMS ENTRY 14-1) (cnv) (Entered: 12/14/2000)
12/18/2000	20	ORDER re rescheduling of p/t mtns hrg date. Mtns hrg resched to 01/19/01 - 1:30 p.m.; [MBA EOD 12/19/2000] (ORIGINAL GCMS ENTRY 15-1) (cnv) (Entered: 12/18/2000)
12/20/2000	21	SUPERSEDING Indict - Sumns issd. Hrg set for 12/22/00 - 10:00 a.m.; [MBA EOD 12/20/2000] (ORIGINAL GCMS ENTRY 16-1) (cnv) (Entered: 12/20/2000)
12/22/2000	22	MINUTE ENTRY - Initial Appearance re Superseding Indictment - DFT enters plea of Not Guilty. Trial set for 01/11/01 - 9:30 a.m. DFT remanded to custody of U.S. Marshals; [MBA EOD 12/26/2000] (ORIGINAL GCMS ENTRY 17-1) (cnv) (Entered: 12/22/2000)
12/27/2000	23	STIPULATION for continuance of trial and order. Trial is now set for 2/8/01 at 9:30 a.m. ; Filed by: DFT Sealed [PTC EOD 01/03/2001] (ORIGINAL GCMS ENTRY 18-1) (cnv) (Entered: 12/27/2000)
01/17/2001	24	GOVERNMENT'S Response to DFT's Mtn to Suppress; [MBA EOD 01/18/2001] (ORIGINAL GCMS ENTRY 19-1) (cnv) (Entered: 01/17/2001)
01/17/2001	25	GOVERNMENT'S Response to DFT's Mtns for Discovery & Inspection; & for Statement of Govt's Intention to Use Evidence; [MBA EOD 01/18/2001] (ORIGINAL GCMS ENTRY 20-1) (cnv) (Entered: 01/17/2001)
01/17/2001	26	GOVERNMENT'S Response to DFT's Mtn for Return of Property; [MBA EOD 01/18/2001] (ORIGINAL GCMS ENTRY 21-1) (cnv) (Entered: 01/17/2001)
01/19/2001	27	STIPULATION for Cont of Mtn for Discovery & Inspection; Mtn for Statement of Govt's Intention to Use Evidence; Mtn to Suppress; and Mtn for Return of Property; & Ord - Mtns reset to 02/01/01 - 2:00 p.m. ; [MBA EOD 01/19/2001] (ORIGINAL GCMS ENTRY 22-1) (cnv) (Entered: 01/19/2001)

01/26/2001	28	RETURN of Sumns in a Cr Cs - Exec 12/21/00; [MBA EOD 01/26/2001] (ORIGINAL GCMS ENTRY 23-1) (cnv) (Entered: 01/26/2001)
01/31/2001	29	STIPULATION to Ext Deadline for Flg Pre-Trial Mot & Mot Hrg; and to Cont Pending Mot for Disc & Inspection; Mot for Statement of Govt's Intention to Use Evidence; Mot to Suppress; and Mot for Ret of Property; & Ord. Pretrial mot ext to 02/16/01. Pretrial mot reset to Thurs, 02/22/01 at 3:30 p.m.; [RSN EOD 02/01/2001] (ORIGINAL GCMS ENTRY 24-1) (cnv) (Entered: 01/31/2001)
01/31/2001	30	STIPULATION for Cont of Trial & Ord. Trial set for 02/08/01 cont'd to 03/08/01 at 9:30 a.m.; [RSN EOD 02/01/2001] (ORIGINAL GCMS ENTRY 25-1) (cnv) (Entered: 01/31/2001)
01/31/2001	31	SUPERSEDING Indict. Sumns issd. Hrg set for 02/05/01 at 1:30 p.m.; [RSN EOD 02/01/2001] (ORIGINAL GCMS ENTRY 26-1) (cnv) (Entered: 01/31/2001)
02/05/2001	32	MINUTE ENTRY - Arraignment - DFT enters plea of Not Guilty on Superseding Indict. Trial set for 03/08/01 - 9:30 a.m. Cs unsealed. DFT remanded to custody of U.S. Marshals; [MBA EOD 02/06/2001] (ORIGINAL GCMS ENTRY 27-1) (cnv) (Entered: 02/05/2001)
02/06/2001	33	MOTION & Ord to Unseal Rec; [MBA EOD 02/06/2001] (ORIGINAL GCMS ENTRY 28-1) (cnv) (Entered: 02/06/2001)
02/14/2001	34	RETURN of sumns in a Cr Cs - Exec 02/05/01; [MBA EOD 02/15/2001] (ORIGINAL GCMS ENTRY 29-1) (cnv) (Entered: 02/14/2001)
02/20/2001	35	MOTION To Withdraw ; [LRH EOD 02/21/2001] (ORIGINAL GCMS ENTRY 30-1) (cnv) (Entered: 02/20/2001)
02/22/2001	36	MINUTE ENTRY - Motion for Return of Property, Motion for Discovery & Inspection, Motion for Statement of Gov'ts Intention to Use Evidence, Motion to Suppress - Mtns argued by Gov't & DFT. Mtn for Ret of Prop - DENIED. Mtn to Suppress - DENIED. Mtn for Disc & Insp - WITHDRAWN. Mtn for Stmt of Gov't's Intention to Use Evidence - WITHDRAWN. DFT rem to t/cust of USMS; [LRH EOD 02/23/2001] (ORIGINAL GCMS ENTRY 31-1) (cnv) (Entered: 02/22/2001)
02/26/2001	37	ORDER - Jehan'Ad G. Martinez apptd to rep t/DFT nunc pro tunc to 11/07/00; [LRH EOD 02/26/2001] (ORIGINAL GCMS ENTRY 32-1) (cnv) (Entered: 02/26/2001)
02/27/2001	38	GOVERNMENT'S Req for Use of Ct's Equip & Ord; [LRH EOD 02/27/2001] (ORIGINAL GCMS ENTRY 33-1) (cnv) (Entered: 02/27/2001)
02/28/2001	39	ORDER - Gerald E. Gray, is hereby granted lv to withdraw as cnsl for DFT. Curtis Van de Veld is hereby apptd to rep t/DFT; [MBA EOD 02/28/2001] (ORIGINAL GCMS ENTRY 34-1) (cnv) (Entered: 02/28/2001)
03/05/2001	40	MOTION to Withdraw as Cnsl; [LRH EOD 03/05/2001] (ORIGINAL GCMS ENTRY 35-1) (cnv) (Entered: 03/05/2001)
03/05/2001	41	DECLARATION in Support of Mtn to Withdraw as Cnsl; [LRH EOD 03/05/2001] (ORIGINAL GCMS ENTRY 36-1) (cnv) (Entered: 03/05/2001)
03/06/2001	42	ORDER Approving Withdrawal & Appt of Cnsl - William C. Bischoff appt to rep t/DFT; [LRH EOD 03/06/2001] (ORIGINAL GCMS ENTRY 37-1) (cnv) (Entered: 03/06/2001)
03/07/2001	43	MOTION to Cont Trial Date; Ord - Trial cont to 04/09/01 - 9:30 a.m.; [LRH EOD 03/07/2001] (ORIGINAL GCMS ENTRY 38-1) (cnv) (Entered: 03/07/2001)
03/14/2001	44	MOTION to Withdraw as Cnsl; Ord - Jehan'ad G. Martinez apptd to rep t/DFT; [LRH EOD 03/14/2001] (ORIGINAL GCMS ENTRY 39-1) (cnv) (Entered: 03/14/2001)
04/02/2001	45	UNITED States' Proposed Voir Dire Questions; [LRH EOD 04/03/2001] (ORIGINAL

		GCMS ENTRY 40-1) (cnv) (Entered: 04/02/2001)
04/02/2001	46	UNITED States' Proposed Jry Instructions; [LRH EOD 04/03/2001] (ORIGINAL GCMS ENTRY 41-1) (cnv) (Entered: 04/02/2001)
04/02/2001	47	UNITED States' Exh List; [LRH EOD 04/03/2001] (ORIGINAL GCMS ENTRY 42-1) (cnv) (Entered: 04/02/2001)
04/02/2001	48	WITNESS List; [LRH EOD 04/03/2001] (ORIGINAL GCMS ENTRY 43-1) (cnv) (Entered: 04/02/2001)
04/02/2001	49	UNITED States' Proposed Verdict Form; [LRH EOD 04/03/2001] (ORIGINAL GCMS ENTRY 44-1) (cnv) (Entered: 04/02/2001)
04/03/2001	50	ORDER - P/T conf set for 04/05/01 - 1:30 p.m.; [MBA EOD 04/03/2001] (ORIGINAL GCMS ENTRY 45-1) (cnv) (Entered: 04/03/2001)
04/03/2001	51	GOVERNMENT'S In Limine Mtn to Resolve Before Trial Certain Issues Re to Tape Recordings, Its Translations, & Transc of Recordings; & Proposed Ord; [MBA EOD 04/03/2001] (ORIGINAL GCMS ENTRY 46-1) (cnv) (Entered: 04/03/2001)
04/03/2001	52	DEFENDANT'S Proposed Jry Instructions; Cert of Svcs; [LRH EOD 04/03/2001] (ORIGINAL GCMS ENTRY 47-1) (cnv) (Entered: 04/03/2001)
04/03/2001	53	DEFENDANT'S Exh List; Cert of Svcs; [MBA EOD 04/03/2001] (ORIGINAL GCMS ENTRY 48-1) (cnv) (Entered: 04/03/2001)
04/03/2001	54	AMENDED DFT's Exhs List; Cert of Svcs; [MBA EOD 04/03/2001] (ORIGINAL GCMS ENTRY 49-1) (cnv) (Entered: 04/03/2001)
04/04/2001	55	UNITED States' Mtn to Rel GJ Transc; [LRH EOD 04/04/2001] (ORIGINAL GCMS ENTRY 50-1) (cnv) (Entered: 04/04/2001)
04/04/2001	56	ORDER Rel GJ Transc; [LRH EOD 04/04/2001] (ORIGINAL GCMS ENTRY 51-1) (cnv) (Entered: 04/04/2001)
04/04/2001	57	GOVERNMENT'S Req for use of Crt's Equip; & Ord; [LRH EOD 04/04/2001] (ORIGINAL GCMS ENTRY 52-1) (cnv) (Entered: 04/04/2001)
04/05/2001	58	MINUTE ENTRY - Pretrial Conference - Ct & cnsl go over possibilities of stips. Opening stmts - 40 mins. ea side/2 alt jurors/2 alt jurors to be identified; [MBA EOD 04/06/2001] (ORIGINAL GCMS ENTRY 53-1) (cnv) (Entered: 04/05/2001)
04/06/2001	59	DEFENDANT'S Proposed Transcriptions of t/Govt's Exh Nos. 1, 3, 5, 7, 9, 11, 13 & 74; [MBA EOD 04/06/2001] (ORIGINAL GCMS ENTRY 54-1) (cnv) (Entered: 04/06/2001)
04/06/2001	60	UNITED States Subm Jencks Materials; [MBA EOD 04/06/2001] (ORIGINAL GCMS ENTRY 55-1) (cnv) (Entered: 04/06/2001)
04/06/2001	61	AMENDED Witness List; [MBA EOD 04/06/2001] (ORIGINAL GCMS ENTRY 56-1) (cnv) (Entered: 04/06/2001)
04/06/2001	62	UNITED States' Amd Exh List; [MBA EOD 04/06/2001] (ORIGINAL GCMS ENTRY 57-1) (cnv) (Entered: 04/06/2001)
04/06/2001	63	ORDER TO SHOW CAUSE - Def cnsl is ORD to show cause why he should not be sanctioned or held in contempt for failing to abide by this Ct's 04/05/01 ord. A hrg on OSC shall be held 04/09/01 at 8:00 a.m.; [MBA EOD 04/06/2001] (ORIGINAL GCMS ENTRY 58-1) (cnv) (Entered: 04/06/2001)
04/09/2001	64	MINUTE ENTRY - Order to Show Cause - Crt gives Mr. Austin an oral warning P/T cont'd to 04/24/01 - 3:00 p.m. Deft remanded to t/cust of USMS; [MBA EOD 04/09/2001] (ORIGINAL GCMS ENTRY 59-1) (cnv) (Entered: 04/09/2001)

04/09/2001	65	MINUTE ENTRY - Jury Trial, 1st Day - Jury voir dire begins. Jurors admonished. Trial cont'd to 04/25/01 - 10:00 a.m. Deft remanded to t/cust of USMS; [MBA EOD 04/09/2001] (ORIGINAL GCMS ENTRY 60-1) (cnv) (Entered: 04/09/2001)
04/09/2001	66	TRANSCRIPT Ord; [LRH EOD 04/10/2001] (ORIGINAL GCMS ENTRY 61-1) (cnv) (Entered: 04/09/2001)
04/10/2001	67	ORDER - P/T Conf mvd to Fri, 04/20/01 - 1:00 p.m.; [LRH EOD 04/10/2001] (ORIGINAL GCMS ENTRY 62-1) (cnv) (Entered: 04/10/2001)
04/16/2001	68	REPORTER'S Transc of t/fol: (orig only) 1. Ord To Show Cause Hrg, dtd Mon., 04/9/01; [LRH EOD 04/17/2001] (ORIGINAL GCMS ENTRY 63-1) (cnv) (Entered: 04/16/2001)
04/19/2001	69	UNITED States' Subm of Addtl Jencks Materials; [MBA EOD 04/19/2001] (ORIGINAL GCMS ENTRY 64-1) (cnv) (Entered: 04/19/2001)
04/20/2001	70	UNITED States' Suppl & Revised Exh; [LRH EOD 04/20/2001] (ORIGINAL GCMS ENTRY 65-1) (cnv) (Entered: 04/20/2001)
04/20/2001	71	MINUTE ENTRY - Pre-Trial Conference - Govt anticipates 4 days of trial. Interp to be made avail. Trial to resume on 04/25/01 - 10:00 a.m.; [LRH EOD 04/20/2001] (ORIGINAL GCMS ENTRY 66-1) (cnv) (Entered: 04/20/2001)
04/24/2001	72	UNITED States' Subm of Addtl Jencks Material; [LRH EOD 04/24/2001] (ORIGINAL GCMS ENTRY 67-1) (cnv) (Entered: 04/24/2001)
04/24/2001	73	UNITED States' Amd Exh List; [LRH EOD 04/25/2001] (ORIGINAL GCMS ENTRY 68-1) (cnv) (Entered: 04/24/2001)
04/25/2001	74	STIPULATION & Ord Regarding Prior Felony Conviction; [LRH EOD 04/25/2001] (ORIGINAL GCMS ENTRY 69-1) (cnv) (Entered: 04/25/2001)
04/25/2001	75	STIPULATION & Ord Regarding Adm of Evid; [LRH EOD 04/25/2001] (ORIGINAL GCMS ENTRY 70-1) (cnv) (Entered: 04/25/2001)
04/25/2001	76	MINUTE ENTRY - Jury Trial, 2nd Day - Jury impanelled & sworn. Jurors excused & instruc to rpt 04/26/01 - 9:30 a.m. Deft rem to cust of USMS; [MBA EOD 04/30/2001] (ORIGINAL GCMS ENTRY 71-1) (cnv) (Entered: 04/25/2001)
04/26/2001	77	MINUTE ENTRY - Jury Trial 3rd Day. Prelim instructions given. Witnesses and exhibits admitted. Jurors admonished and instructed to return 4/30/01 at 9 a.m. Deft. remanded to custody.; [PTC EOD 05/03/2001] (ORIGINAL GCMS ENTRY 71a-1) (cnv) (Entered: 04/26/2001)
04/30/2001	78	MINUTE ENTRY - Jury Trial Day 4. Witnesses and exhibits admitted. Trial contd to 5/1/01 at 9 a.m. Deft. remanded.; [PTC EOD 05/03/2001] (ORIGINAL GCMS ENTRY 71b-1) (cnv) (Entered: 04/30/2001)
05/01/2001	79	ORDER to Rel Info re Req to Rel P/T Svcs Rpt & Drug Testing Form; [LRH EOD 05/01/2001] (ORIGINAL GCMS ENTRY 72-1) (cnv) (Entered: 05/01/2001)
05/01/2001	80	MINUTE ENTRY - Jury Trial Day 5. Witnesses sworn and examined. Exhibits marked and admitted. Trial contd. to 5/2/01 at 9:00 a.m. Deft. remanded.; [PTC EOD 05/03/2001] (ORIGINAL GCMS ENTRY 72a-1) (cnv) (Entered: 05/01/2001)
05/02/2001	81	MOTION in Limine; [LRH EOD 05/02/2001] (ORIGINAL GCMS ENTRY 73-1) (cnv) (Entered: 05/02/2001)
05/02/2001	82	MOTION in Limine; Amd Cert of Svc; [LRH EOD 05/02/2001] (ORIGINAL GCMS ENTRY 74-1) (cnv) (Entered: 05/02/2001)
05/02/2001	83	PROPOSED Instruction; [LRH EOD 05/02/2001] (ORIGINAL GCMS ENTRY 75-1) (cnv) (Entered: 05/02/2001)



05/02/2001	84	UNITED States' Amd Proposed Verdict Form; [LRH EOD 05/02/2001] (ORIGINAL GCMS ENTRY 76-1) (cnv) (Entered: 05/02/2001)
05/02/2001	85	DEFENDANT'S Proposed Jury Instructions; Oppo to Various Govt Instructions; Cert of Svc; [LRH EOD 05/02/2001] (ORIGINAL GCMS ENTRY 77-1) (cnv) (Entered: 05/02/2001)
05/02/2001	86	MINUTE ENTRY - Jury Trial Day 6. Witness sworn and examined. Exhibits marked and admitted. Trial contd. to 5/3/01 at 10AM. Deft. remanded.; [PTC EOD 05/03/2001] (ORIGINAL GCMS ENTRY 78-1) (cnv) (Entered: 05/02/2001)
05/03/2001	87	JURY Instructions as Given by t/Crt; [LRH EOD 05/04/2001] (ORIGINAL GCMS ENTRY 79-1) (cnv) (Entered: 05/03/2001)
05/03/2001	88	MINUTE ENTRY - Jury Trial Day 7 - Mtn for judgt of acquittal - Denied. Cs contd to 05/04/01 - 9:00 a.m. Jury retires to deliberate at 3:37 p.m. Jury deliberation contd to 05/04/01 - Jury will be polled. Deft rem to cust ; [LRH EOD 05/04/2001] (ORIGINAL GCMS ENTRY 80-1) (cnv) (Entered: 05/03/2001)
05/03/2001	89	JUROR'S Notes; [LRH EOD 05/04/2001] (ORIGINAL GCMS ENTRY 81-1) (cnv) (Entered: 05/03/2001)
05/04/2001	90	MINUTE ENTRY - Jury Trial (re Jury Question) - Ernesto Peredo explains to Crt & cnsl what happened during phone call recd. Mr. E. Peredo excused. Pilar Concepcion brought in room & questioned re conversation w/ E. Peredo. Pilar Concepcion excused. 10:05 a.m. - 10:24 a.m. recess; [LRH EOD 05/08/2001] (ORIGINAL GCMS ENTRY 82-1) (cnv) (Entered: 05/04/2001)
05/04/2001	91	JUROR'S Notes; [LRH EOD 05/08/2001] (ORIGINAL GCMS ENTRY 83-1) (cnv) (Entered: 05/04/2001)
05/04/2001	92	JUROR'S Notes; [LRH EOD 05/08/2001] (ORIGINAL GCMS ENTRY 84-1) (cnv) (Entered: 05/04/2001)
05/04/2001	93	JUROR'S Notes; [LRH EOD 05/08/2001] (ORIGINAL GCMS ENTRY 85-1) (cnv) (Entered: 05/04/2001)
05/04/2001	94	JUROR'S Notes; [LRH EOD 05/08/2001] (ORIGINAL GCMS ENTRY 86-1) (cnv) (Entered: 05/04/2001)
05/07/2001	95	JUROR'S Notes; [LRH EOD 05/08/2001] (ORIGINAL GCMS ENTRY 87-1) (cnv) (Entered: 05/07/2001)
05/07/2001	96	VERDICT; [LRH EOD 05/08/2001] (ORIGINAL GCMS ENTRY 88-1) (cnv) (Entered: 05/07/2001)
05/07/2001	97	MINUTE ENTRY - Jury Trial Day 8 - Jry returns at 2:30 p.m. - Deft Guilty on cts 1-6; Jry polled. Deft rem to cust. Case contd to 08/23/01 - 1:30 p.m. for sent; PSR due 07/20/01.; [LRH EOD 05/08/2001] (ORIGINAL GCMS ENTRY 89-1) (cnv) (Entered: 05/07/2001)
05/08/2001	98	ABSTRACT of Ord for USPO; [LRH EOD 05/08/2001] (ORIGINAL GCMS ENTRY 90-1) (cnv) (Entered: 05/08/2001)
08/02/2001	99	DEFENDANT'S Resp to PSI Rpt; [LRH EOD 08/03/2001] (ORIGINAL GCMS ENTRY 91-1) (cnv) (Entered: 08/02/2001)
08/07/2001	100	ORDER - Sent mvd to Thurs., 08/30/01 - 1:30 p.m.; [LRH EOD 08/17/2001] (ORIGINAL GCMS ENTRY 91A-1) (cnv) (Entered: 08/07/2001)
08/09/2001	101	ORDER - Sent mvd to Thurs., 08/30/01 - 1:30 p.m.; [LRH EOD 08/09/2001] (ORIGINAL GCMS ENTRY 92-1) (cnv) (Entered: 08/09/2001)
08/10/2001	102	GOVERNMENT'S Resp to Draft PSI Rpt; [LRH EOD 08/10/2001] (ORIGINAL

		GCMS ENTRY 93-1) (cnv) (Entered: 08/10/2001)
08/10/2001	103	GOVERNMENT'S Resp to Deft's Obj to PSI Rpt; [LRH EOD 08/10/2001] (ORIGINAL GCMS ENTRY 94-1) (cnv) (Entered: 08/10/2001)
08/22/2001	104	ORDER - due to the scheduling needs of the court, the 08/30/01 sentencing hrg is hereby moved to 9/6/01 at 4 p.m.; Filed by: GOVPTF U.S.A. [LRH EOD 08/22/2001] (ORIGINAL GCMS ENTRY 95-1) (cnv) (Entered: 08/22/2001)
08/28/2001	105	DEFENDANT'S Resp to Addendum to PSR; [MBA EOD 08/28/2001] (ORIGINAL GCMS ENTRY 96-1) (cnv) (Entered: 08/28/2001)
09/06/2001	106	DEFENDANT'S Supp Sent Brief; [LRH EOD 09/07/2001] (ORIGINAL GCMS ENTRY 97-1) (cnv) (Entered: 09/06/2001)
09/07/2001	107	STIPULATION to Cont Sent Hrg; & Ord - Sent contd to 09/13/01 - 4:00 p.m.; [LRH EOD 09/07/2001] (ORIGINAL GCMS ENTRY 98-1) (cnv) (Entered: 09/07/2001)
09/11/2001	108	GOVERNMENT'S Resp to Deft's Supplmtl Sent Brf; [MBA EOD 09/11/2001] (ORIGINAL GCMS ENTRY 99-1) (cnv) (Entered: 09/11/2001)
09/13/2001	109	ORDER - Sent mvd to 09/14/01 - 9:00 a.m.; [WMT EOD 09/13/2001] (ORIGINAL GCMS ENTRY 100-1) (cnv) (Entered: 09/13/2001)
09/17/2001	110	ORDER - Sent moved to 10/09/01 - 1:30 p.m. Cnsl shall file, NLT 09/24/01, further brfng on t/implications of recent 9th Cir decision. Resp brfids may be submitted NLT 10/01/01; [MBA EOD 09/17/2001] (ORIGINAL GCMS ENTRY 101-1) (cnv) (Entered: 09/17/2001)
09/20/2001	111	GOVERNMENT'S Add'l Resp to Deft's Supplmtl Sent Brf; [MBA EOD 09/20/2001] (ORIGINAL GCMS ENTRY 102-1) (cnv) (Entered: 09/20/2001)
09/24/2001	112	DEFENDANT'S Add'l Sent Brf re Apprendi & Buckland Iss; [MBA EOD 09/24/2001] (ORIGINAL GCMS ENTRY 103-1) (cnv) (Entered: 09/24/2001)
10/09/2001	113	STIPULATION & Ord re Sent - DENIED; [MBA EOD 10/10/2001] (ORIGINAL GCMS ENTRY 104-1) (cnv) (Entered: 10/09/2001)
10/09/2001	114	MINUTE ENTRY - Sentencing - Deft sent to 365 mos. impris to run concurrent to Cts 1 thru 6; Ct 1 - 5 yrs, Ct 2 - 5 yrs, Ct 3 - 5 yrs, Ct 4 - 1 yr, Ct 5 - 3 yrs, Ct 6 - 3 yrs suprvd rel (to run concurrent); 400 hrs. community svcs; \$600.00 SA; fine waived. Deft ord rem for immediate incarceration; [MBA EOD 10/15/2001] (ORIGINAL GCMS ENTRY 104A-1) (cnv) (Entered: 10/09/2001)
10/12/2001	115	MOTION for Withdrawal as Cnsl - Jehan'Ad Martinez withdraw as cnsl for deft. Rawlen M. Mantanona apptd to rep t/deft for appl purposes; [MBA EOD 10/15/2001] (ORIGINAL GCMS ENTRY 105-1) (cnv) (Entered: 10/12/2001)
10/19/2001	116	NOTICE of Mtn; [MBA EOD 10/19/2001] (ORIGINAL GCMS ENTRY 106-1) (cnv) (Entered: 10/19/2001)
10/19/2001	117	MOTION to Withdraw as Cnsl for Deft on Appl - Sandra Lynch apptd to rep t/deft; [MBA EOD 10/19/2001] (ORIGINAL GCMS ENTRY 106-2) (cnv) (Entered: 10/19/2001)
10/22/2001	118	JUDGMENT in a Cr Cs; [MBA EOD 10/22/2001] (ORIGINAL GCMS ENTRY 107-1) (cnv) (Entered: 10/22/2001)
11/07/2001	119	NOTICE of Appeal; Filed by: DFT Dela Pena, Isagani P., Jr. [PTC EOD 11/08/2001] (ORIGINAL GCMS ENTRY 108-1) (cnv) (Entered: 11/07/2001)
11/19/2001	120	NOTICE of Lien for Fine and/or Restit; [MBA EOD 11/19/2001] (ORIGINAL GCMS ENTRY 109-1) (cnv) (Entered: 11/19/2001)

11/28/2001	121	TRANSCRIPT Ord; [MBA EOD 11/28/2001] (ORIGINAL GCMS ENTRY 110-1) (cnv) (Entered: 11/28/2001)
12/03/2001	122	MOTION to Extend Time for Flg Not of Appl; [MBA EOD 12/03/2001] (ORIGINAL GCMS ENTRY 111-1) (cnv) (Entered: 12/03/2001)
12/03/2001	123	DECLARATION of Cnsl in Supt of Mtn to Extend Time for Flg of Not of Appl; [MBA EOD 12/03/2001] (ORIGINAL GCMS ENTRY 112-1) (cnv) (Entered: 12/03/2001)
12/03/2001	124	AFFIDAVIT of Noel V. Leon Guerrero; [MBA EOD 12/03/2001] (ORIGINAL GCMS ENTRY 113-1) (cnv) (Entered: 12/03/2001)
12/03/2001	125	AFFIDAVIT of Jay Anderson; [MBA EOD 12/03/2001] (ORIGINAL GCMS ENTRY 114-1) (cnv) (Entered: 12/03/2001)
12/10/2001	126	ORDER - Deft's Mtn to Extend Time for Flg Ntc of Appeal fld on 12/3/01. Deft Appealed his conviction & sent to t/Ninth Circuit of Appeals. Crt must Dism t/deft's mtn at this time on t/basis that this crt lacks jurisdiction over t/matter; [WMT EOD 12/10/2001] (ORIGINAL GCMS ENTRY 115-1) (cnv) (Entered: 12/10/2001)
02/11/2002	127	ORDER from t/Crt of Appeals - CA#01-10671 - Cs is rem to t/Dist Crt, pursuant to circuit crt policy, for t/ltd purpose of permitting t/dist crt to provide appellant ntc & an opportunity to req that t/time for flg t/ntc of appeal be extended for a period not to exceed 40 days from t/entry of t/appealable judgt or ord based on a showing of excusable neglect; [RMM EOD 02/12/2002] (ORIGINAL GCMS ENTRY 116-1) (cnv) (Entered: 02/11/2002)
02/14/2002	128	ORDER - This matter is before t/Crt on a mandate from 9th Cir Ct rem t/case back in ord to provide t/deft not & an opportunity to req that t/time for flg t/not of appl be extended for a period not to exceed 40 days frm the entry of t/appl judgt based on a showing of excusable neglect. Accordingly, t/deft shall file such a reqt NLT 02/21/02. T/Govt shall file a resp to t/reqt NLT 02/22/02. Thereafter, t/Crt will issue its findings w/o further hrg; [MBA EOD 02/14/2002] (ORIGINAL GCMS ENTRY 117-1) (cnv) (Entered: 02/14/2002)
02/14/2002	129	REPORTER'S Transc of t/fol: (orig + 1 cpy) 1. Mtns., dtd Thurs., 02/22/01 2. OSC, dtd Mon., 04/09/01 3. Trial - Jury Selection, dtd Mon., 04/09/01 & 04/25/01 - Vol 1 4. Trial, dtd 04/26/01 - Vol 2 5. Trial, dtd 04/30/01 - Vol 3; [MBA EOD 02/14/2002] (ORIGINAL GCMS ENTRY 118-1) (cnv) (Entered: 02/14/2002)
02/20/2002	130	MOTION to Extend time for Filing Not of Appl; [MBA EOD 02/21/2002] (ORIGINAL GCMS ENTRY 119-1) (cnv) (Entered: 02/20/2002)
02/22/2002	131	GOVERNMENT'S Oppo to Deft's Mtn to Ext Time for Flg Not of Appl; [MBA EOD 02/22/2002] (ORIGINAL GCMS ENTRY 120-1) (cnv) (Entered: 02/22/2002)
02/25/2002	132	REPLY to Oppo to Mtn to Ext Time for Flg of Ntc of Appl; [MBA EOD 02/25/2002] (ORIGINAL GCMS ENTRY 121-1) (cnv) (Entered: 02/25/2002)
02/28/2002	133	ORDER - T/Crt finds t/existence of excusable neglect for t/Deft's untimely Ntc of Appl. Accordingly, t/Deft's Mtn to Extend Time for Filing t/Ntc of Appl is hereby GRANTED; [MBA EOD 02/28/2002] (ORIGINAL GCMS ENTRY 122-1) (cnv) (Entered: 02/28/2002)
03/29/2002	134	REPORTER'S Transc(s) of t/fol: (orig + 1 cpy) 1. Trial Transcript, dtd Tues., 05/01/01 - Vol 4 2. Trial Transcript, dtd Wed., 05/02/01 - Vol 5 3. Trial Transcript, dtd Thurs., 05/03/01; Fri., 05/04/01; Mon, 05/07/01 4. Sent Hrg., Tues., 10/09/01; [MBA EOD 03/29/2002] (ORIGINAL GCMS ENTRY 123-1) (cnv) (Entered: 03/29/2002)
07/23/2002	135	ACKNOWLEDGEMENT of Receipt of Exhs; [MBA EOD 07/23/2002] (ORIGINAL GCMS ENTRY 124-1) (cnv) (Entered: 07/23/2002)
03/25/2003	136	MANDATE fm 9th Cir Crt - AFFIRMED; [MBA EOD 03/25/2003] (ORIGINAL



		GCMS ENTRY 125-1) (cnv) (Entered: 03/25/2003)
11/21/2003	137	TRANSCRIPT Ord; [MBA EOD 11/21/2003] (ORIGINAL GCMS ENTRY 126-1) (cnv) (Entered: 11/21/2003)
01/23/2004	138	MOTION Under 28 USC 2255 Motion to Vacate, Set Aside, or Correct Sentence by a Person in Federal Custody; [MBA EOD 01/23/2004] (ORIGINAL GCMS ENTRY 127-1) (cnv) (Entered: 01/23/2004)
02/06/2004	139	REPORTER'S Transc of t/fol: (orig only) 1. Opening & Closing Stmt, 04/26/01 & 05/03/01; [LRH EOD 02/08/2004] (ORIGINAL GCMS ENTRY 128-1) (cnv) (Entered: 02/06/2004)
02/06/2004	140	ORDER - t/Crt is in rcpt of Deft-Petr Isagani Dela Pena Jr's mtn for relief under 28 USC 2255. T/Govt shall have until 03/05/04, in which to file a resp to t/mtn. If a resp is recd, t/Petr shall have 30 days from receipt of t/ U.S. resp in which to file a reply. If t/Crt finds that a hrg is necessary on Petr 2255 mtn, a hrg date will be set at a later date.; [LRH EOD 02/08/2004] (ORIGINAL GCMS ENTRY 129-1) (cnv) (Entered: 02/06/2004)
03/04/2004	141	TRANSCRIPT - Order ; [RSN EOD 03/04/2004] (ORIGINAL GCMS ENTRY 130-1) (cnv) (Entered: 03/04/2004)
03/05/2004	142	UNITED States' Mtn for Extension of Time to File Response to Deft's Mtn to Vacate, Set Aside, or Correct Sent & Ord - U.S.A may have until 03/19/04 in which to file an answer to Deft-Petitioner's 2255 mtn; [MBA EOD 03/08/2004] (ORIGINAL GCMS ENTRY 131-1) (cnv) (Entered: 03/05/2004)
03/12/2004	143	MEMORANDUM of Law in Support of Mtn to Vacate, Set Aside, or Correct Sent Pursuant to 28 USC 2255; [MBA EOD 03/12/2004] (ORIGINAL GCMS ENTRY 132-1) (cnv) (Entered: 03/12/2004)
03/23/2004	144	UNITED States' Second Mtn for Extension of Time to File Response to Deft's Mtn to Vacate, Set Aside, or Correct Sent & Ord - U.S. may have until 04/12/04 to file an answer to Deft-Petitioner's 2255 mtn; [MBA EOD 03/24/2004] (ORIGINAL GCMS ENTRY 133-1) (cnv) (Entered: 03/23/2004)
03/25/2004	145	GOVERNMENT'S Response to Deft's Mtn to Vacate, Set Aside, or Correct Sent; [MBA EOD 03/25/2004] (ORIGINAL GCMS ENTRY 134-1) (cnv) (Entered: 03/25/2004)
05/04/2004	146	DEFENDANT'S Traverse to Government's Response to Defendant's Motion to Vacate, Set Aside, or Correct Sentence; [MBA EOD 04/25/2005] (ORIGINAL GCMS ENTRY 135-1) (cnv) (Entered: 05/04/2004)
07/07/2005	147	ORDER re Motion to Vacate, Set Aside or Correct Sentenced by a Person in a Federal Custody pursuant to 28 USC 2255. After considering all the submissions, the Court DENIES defendant's motion in its entirety; [MBA EOD 07/07/2005] (ORIGINAL GCMS ENTRY 136-1) (cnv) (Entered: 07/07/2005)
08/15/2005	<u>148</u>	Notice of Appeal; Motion for Certificate of Appealability filed by Isagani P. Dela Pena, Jr. re [147] Order Denying 2255 Motion (mba, ) Modified on 8/16/2005 (rsn, ). (Entered: 08/16/2005)
08/15/2005	<u>149</u>	Certificate of Service as to Isagani P. Dela Pena, Jr. re <u>148</u> Notice of Appeal, Motion for Certificate of Appealability (mba, ) (Entered: 08/16/2005)
03/23/2006	<u>150</u>	Motion for Accelerated Adjudication of Motion for Certificate of Appealability re <u>148</u> Notice of Appeal; Motion for Certificate of Appealability by Isagani P. Dela Pena, JR. (lth, ) (Entered: 03/23/2006)
03/28/2006	<u>151</u>	Certificate of Service as to Isagani P. Dela Pena, Jr. re <u>150</u> Motion for Accelerated Adjudication of Motion for Certificate of Appealability (mba, ) (Entered: 03/28/2006)

03/31/2006	<u>152</u>	Order denying <u>150</u> Motion for Accelerated Adjudication of Motion for Certificate of Appealability as to Isagani P. Dela Pena Jr (Related document: <u>148</u> Notice of Appeal). (1). Signed by Judge Robert M. Takasugi on 3/30/2006. (mba, ) **Modified on 3/31/2006 to add docket relationship** (mba, ). (Entered: 03/31/2006)
03/31/2006	<u>153</u>	Notice of Entry re <u>152</u> Order denying <u>150</u> Motion for Accelerated Adjudication of Motion for Certificate of Appealability (Related document: <u>148</u> Notice of Appeal). (mba, ) (Entered: 03/31/2006)
04/04/2006	<u>154</u>	Certificate of Service re <u>153</u> Notice of Entry, <u>152</u> Order denying <u>150</u> Motion for Accelerated Adjudication of Motion for Certificate of Appealability as to Isagani P. Dela Pena, Jr.. (Related document: <u>148</u> Notice of Appeal). (mba, ) (Entered: 04/04/2006)
10/10/2006	<u>155</u>	Order of USCA (certified copy) as to Isagani P. Dela Pena, Jr re <u>148</u> Notice of Appeal. The request for a certificate of appealability is denied.(mba, ) (Entered: 10/23/2006)
10/23/2006	<u>156</u>	Amended Order of USCA (certified copy) as to Isagani P. Dela Pena, Jr. (Related documents: <u>155</u> Order of USCA (certified copy), <u>148</u> Notice of Appeal).(mba, ) (Entered: 10/23/2006)
10/23/2006		Ninth Circuit Court of Appeals amended their order to include the criminal case number as to Isagani P. Dela Pena, Jr. (mba, ) (Entered: 10/23/2006)
10/24/2006		Court Certificate of Service as to Isagani P. Dela Pena, JR re <u>155</u> USCA Order, <u>156</u> Amended USCA Order - USAO acknowledged receipt on 10/24/2006. (mba, ) (Entered: 10/24/2006)
10/24/2006	<u>157</u>	Certificate of Service as to Isagani P. Dela Pena, JR re <u>155</u> USCA Order, <u>156</u> Amended USCA Order. (mba, ) (Entered: 10/24/2006)
01/11/2007	<u>158</u>	Certificate of Release of Lien filed by USA as to Isagani P. Dela Pena, Jr. (vtk, ) (Entered: 01/11/2007)

PACER Service Center			
Transaction Receipt			
01/10/2008 03:02:31			
PACER Login:	us4090	Client Code:	
Description:	Docket Report	Search Criteria:	1:00-cr-00126
Billable Pages:	10	Cost:	0.80

CERTIFICATE OF SERVICE

I, **ALEX SILVERIO**, declare:

That I am a citizen of the United States and resident or employed in Los Angeles County, California; that my business address is the Office of United States Attorney, United States Courthouse, 312 North Spring Street, Los Angeles, California 90012; that I am over the age of eighteen years, and am not a party to the above-entitled action;

That I am employed by the United States Attorney for the Central District of California who is a member of the Bar of the United States District Court for the Central District of California; at whose direction I served a copy of: **GOVERNMENT'S MOTION TO DISMISS PETITION FOR WRIT OF HABEAS CORPUS PURSUANT TO 28 USC § 2241; DECLARATION OF ERIC D. VANDEVELDE; EXHIBITS**

☐ Placed in a closed envelope, for collection and interoffice delivery addressed as follows:

☒ Placed in a sealed envelope for collection and mailing via United States Mail, addressed as follows:

☐ By hand delivery addressed as follows:

☐ By facsimile as follows:

☐ By messenger as follows:

☐ By federal express as follows:

**ISAGANI DE LA PENA  
REG. NO. 00944-093  
FCI VICTORVILLE MEDIUM I  
FEDERAL CORRECTIONAL INSTITUTION  
P.O. BOX 5300  
ADELANTO, CA 92301**

This Certificate is executed on **JANUARY 16, 2008**, at Los Angeles, California.

I certify under penalty of perjury that the foregoing is true and correct.

  
\_\_\_\_\_  
**ALEX SILVERIO**

1  
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4  
5  
6  
7  
8 UNITED STATES DISTRICT COURT  
9 CENTRAL DISTRICT OF CALIFORNIA  
10 WESTERN DIVISION  
11

12 ISAGANI DE LA PENA,

13 Petitioner,

14 v.

15 S. A. HOLENCIK,

16 Respondent.  
17

No. CV 07-7150-R (AGR)

ORDER RE: FILING OF OPPOSITION TO  
MOTION TO DISMISS

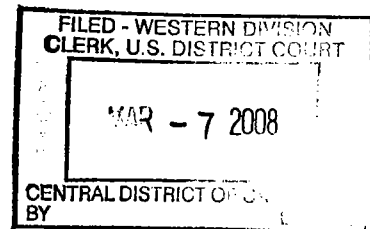
18 On January 16, 2008, respondent filed a Motion to Dismiss Petition for Writ of Habeas  
19 Corpus. Petitioner's Opposition to respondent's Motion to Dismiss was due by February 16, 2008.  
20 The Court believes that an Opposition may be of assistance in determining this matter. Therefore,  
21 it is **ordered** that petitioner file an Opposition **no later than April 7, 2008**. Petitioner is advised  
22 that failure to oppose a motion to dismiss may be construed as consent to the granting of the  
23 motion, and may result in dismissal of the action. Local Rule 7-12.

24 Unless the Court orders otherwise, the matter will be deemed submitted on the day  
25 following the day petitioner's Opposition is due.

26  
27 DATED: March 6, 2008  
28

*Alicia G. Rosenberg*

ALICIA G. ROSENBERG  
UNITED STATES MAGISTRATE JUDGE



1 Isagani Dela Pena, Jr.  
2 Reg. No. 00944-093  
3 Propria Persona  
4 FCI-Victorville I  
5 P.O. Box 5300  
6 Adelanto, CA 92301  
7  
8  
9

10 IN THE UNITED STATES DISTRICT COURT  
11  
12 FOR THE CENTRAL DISTRICT OF CALIFORNIA  
13

14 ISAGANI DE LA PENA, )

15 Petitioner, )

16 v. )

17 S.A. HOLENCIK, Warden, )

18 Respondent. )  
19  
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CASE NO. CV 07-7150-R (AGR)

TRAVERSE MOTION IN RESPONSE TO  
GOVERNMENT'S MOTION TO DISMISS  
PETITION

29 COMES NOW, the Petitioner, Isagani De La Pena, acting in  
30 propria persona, respectfully submits this Traverse Motion in  
31 Rebuttal to Government's Motion to Dismiss Petition, pursuant to  
32 all Federal Rules, Regulations and Procedures, including 28 U.S.C.  
33 § 2241.

34 This Motion is based upon the attached Memorandum of Points  
35 and Authorities.

36 //

37 //

38 //

39 //

40 //

41 //

1                                    MEMORANDUM OF POINTS AND AUTHORITIES

2  
3            The Petitioner is currently incarcerated at the Federal  
4 Correctional Institution-Victorville I in Adelanto, California which  
5 is in the Central District of California.

6            The Government contends that the § 2241 Petition filed by  
7 the Petitioner should be dismissed for lack of jurisdiction, in that  
8 the Petitioner challenges the validity of his convictions and sen-  
9 tence, not the manner in which his sentence is being executed.

10           The Petitioner contended that the execution of his sen-  
11 tence was illegal because he was improperly convicted of two lesser  
12 included offenses and that a competent effective counsel of record  
13 would have objected to any conviction on a lesser included offense.

14           The Government argues that the Petition must be dismissed  
15 because it attacks Petitioner's conviction and sentence and that  
16 § 2255 is the proper vehicle for such attacks.

17           The Government also argued that the Petitioner has not  
18 shown that a § 2255 "Savings Clause" applies.  
19

20                                    ARGUMENT

21           The proper vehicle for attacking the execution of sentence  
22 is 28 U.S.C. § 2241. [See Grasso v. Norton, 520 F.2d 27 (2d Cir.  
23 1975); Garafola v. Benson, 505 F.2d 1212 (7th Cir. 1975)]. A writ  
24 of habeas corpus under the terms of that section, however, may be  
25 granted by district courts only "within their respective juris-  
26 dictions." [Braden v. 30th Judicial Circuit Court, 410 U.S. 484,  
27 93 S.Ct. 1123, 35 L.Ed.2d 443 (1973)], the most recent Supreme  
28 Court consideration of the jurisdictional requirements of § 2241(a),

1 dispenses with the absolute requirement of Ahrens v. Clark, 335 U.S.  
2 188, 68 S.Ct. 1443, 92 L.Ed. 1898 (1948), that the prisoner be  
3 located within the district court's jurisdiction. But Braden main-  
4 tains the "minimum jurisdictional requisite of the presence of the  
5 custodian within the territorial confines of the district court."  
6 (Lee supra, 591 F.2d at 591). In this case, the Petitioner is in  
7 immediate custodian with the warden of the FCI-Victorville I,  
8 Adelanto, California.

9         The Petitioner's challenged the manner in which his  
10 sentence was executed by the illegality of a sentence in that,  
11 Count 2, distribution of methamphetamine [21 U.S.C. § 841(a)(1)],  
12 is a lesser included offense of Count 3, distribution of metham-  
13 phetamine near a school [21 U.S.C. § 860]; and Count 5, possession  
14 of a firearm by a felon [18 U.S.C. § 922(g)(1)], is a lesser inclu-  
15 ded offense of Count 6, possession of a firearm by an unlawful drug  
16 user [18 U.S.C. § 922(g)(3)]; in which, constituted ineffectiveness  
17 of counsel for failure to object to any conviction on a lesser  
18 included offense. The execution of the sentence is illegal and  
19 invalid. Result of this ineffectiveness of counsel is that the  
20 Petitioner has never had his "unobstructed procedural shot" at  
21 challenging the unconstitutional convictions for which he is "legally  
22 innocent."

23         The government has tried to construe the Petitioner's  
24 § 2241 Petition as a § 2255 and contends lack of jurisdiction. The  
25 Petitioner has stated the he is clearly "legally innocent" when it  
26 comes to the lesser offense. Under 28 U.S.C. § 2241, pursuant to  
27 the "savings clause," the Petitioner has the right to file a  
28 § 2241 Petition when he claims to be: [1] legally innocent of the

1 crime for which he has been convicted; and [2] has never had an  
2 "unobstructed procedural shot" at presenting this claim. [See  
3 Lorenstsen v. Hood, 223 F.3d 950, 954 (2000)]. In U.S. v. Smith,  
4 285 F.3d 6, 8 (D.C. Cir. 2000), courts have allowed petitions to  
5 proceed under 28 U.S.C. § 2241 when the defendants have "been  
6 convicted on the basis of an incorrect understanding of the law,  
7 and that § 2255 relief is unavailable to him."

8         The government is requesting evidence to warrant any type  
9 of factual, actual, or legal innocence. If the possibility of  
10 relief under § 2255 is foreclosed, a federal prisoner who is "act-  
11 ually innocent" of the crime of conviction, but who never has had  
12 "an unobstructed procedural shot" at presenting a claim of inno-  
13 cence, may resort to § 2241. [See, e.g. Wofford v. Scott, 177 F.3d  
14 1236 (11th Cir. 1999); In re Davenport, 147 F.3d 605 (7th Cir. 1996);  
15 Triestman v. U.S., 124 F.3d 361 (2d Cir. 1997); In re Dorsainvil,  
16 119 F.3d 245 (3d Cir. 1997).]

17         In Bousley v. U.S., 523 U.S. 614, 623, 118 S.Ct. 1604,  
18 140 L.Ed.2d 828 (1998), the Supreme Court, explained that, "[t]o  
19 establish actual innocence, Petitioner must demonstrate that, in  
20 light of all the evidence, it is more likely than not that no  
21 reasonable juror would have convicted him." (Internal quotation  
22 marks omitted). Petitioner bears the burden of proof on this  
23 issue by a preponderance of the evidence, and he must show not just  
24 that the evidence against him was weak, but that it was so weak  
25 that "no reasonable juror" would have convicted him. [See Dejan  
26 v. U.S., 208 F.3d 682, 686 (8th Cir. 2000)]. In making or re-  
27 butting this showing, the Petitioner has had an obstructed pro-  
28 cedural shot at presenting a claim of innocence, and is not just



1 mere legal insufficiency." (Bousley, 523 U.S. at 623, 118 S.Ct.  
2 1604). Here, the fact that the Petitioner's convictions for two  
3 (2) Counts (Counts II and III) constitute multiple punishments for  
4 the same offense in violation of the Double Jeopardy Clause and  
5 requires vacation of a conviction as to the lesser offense, in  
6 which, is well settled law at this time and cannot be disputed.  
7 [See U.S. V. CABBACCANG, 481 F.3d 1176, 1180 (9th Cir. 2007)].  
8  
9

### 10 CONCLUSION

11 For the reasons noted above, the Petition should be  
12 GRANTED in its entirety under 28 U.S.C. § 2241 in which, this  
13 Honorable Court has jurisdiction and DENY the government's Motion  
14 to Dismiss.

15 The Petitioner also respectfully requests this Honorable  
16 Court to allow/permit the Petitioner to submit another Rebuttal/  
17 Traverse in rebuttal to the governments briefing on the merits of  
18 Petitioner's claims, should the Court DENY the government's Motion  
19 to Dismiss.

20 **RESPECTFULLY SUBMITTED** on this 20th day of February, 2008.  
21

22 Isagani De La Pena  
23 Isagani De La Pena/Petitioner  
24 Propria Persona  
25  
26  
27  
28

# CERTIFICATE OF SERVICE

I, Isagani De La Pena hereby certify that I have served a true and correct copy of the following:

## TRAVERSE MOTION

Which is deemed filed at the time it was delivered to prison authorities for forwarding, Houston v. Lack, 101 L.Ed.2d 245 (1988), upon the defendant/defendants and or his attorney/attorneys of record, by placing same in a sealed, postage prepaid envelope addressed to:

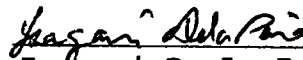
United States District Court  
Central District of California  
Clerk of the Court  
312 N. Spring Street  
Los Angeles, CA 90012

Eric D. Vandavelde  
Assistant U.S. Attorney  
U.S. Attorneys Office  
Central District of California  
312 N. Spring Street  
Los Angeles, CA 90012

and deposited same in the United States Mail at the Federal Correctional Institution, Adelanto, California - FCI-Victorville I Mail Room.

I declare, under penalty of perjury (Title 28 U.S.C. §1746), that the foregoing is true and correct.

Dated this 20th day of February, 2008.



Isagani De La Pena/Petitioner

Propria Persona